

1-1-2007

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M. C. Mirow

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Recommended Citation

M. C. Mirow, *Marbury in Mexico: Judicial Review's Precocious Southern Migration*, 35 HASTINGS CONST. L.Q. 41 (2007).
Available at: https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol35/iss1/2

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Marbury in Mexico: Judicial Review's Precocious Southern Migration

by M. C. MIROW*

"There, *one opinion* of Marshall is worth as much as a law"¹
Ignacio Vallarta, President of the Supreme Court of Mexico,
writing about the United States

In 1881, Ignacio Vallarta,² President of the Supreme Court of Mexico,

* Associate Professor of Law and founding faculty member, Florida International University College of Law, Miami. Ph.D. (law), 2003, Leiden University; Ph.D. (law), 1993, Cambridge University; J.D., 1986, Cornell Law School; B.A., 1983, Boston University. This paper was presented as "*Marbury* in Mexico" at a Washington University Workshop on Latin American Law, and I thank the workshop participants, particularly Jorge Alemany, Dale Furnish, John Haley, Máximo Langer, Joseph Thome, and Steven Zamora for their comments. I also thank Céline Abrahmschmitt, Ediberto Román, and Howard Wasserman. Translations and errors are mine.

1. 4 IGNACIO L. VALLARTA, CUESTIONES CONSTITUCIONALES: VOTOS QUE COMO PRESIDENTE DE LA SUPREMA CORTE DE JUSTICIA DIO EN LOS NEGOCIOS MAS NOTABLES RESUELTOS POR ESTE TRIBUNAL DE 1 DE ENERO A 16 DE NOVIEMBRE DE 1882, at 497-98 (1896) [hereinafter VALLARTA, VOTOS].

2. Ignacio Luis Vallarta was born in Guadalajara in 1830 and died in Mexico City in 1893. He obtained his law degree from the University of Guadalajara in 1854 and was a deputy to the Constituent Congress charged with drafting the Mexican Constitution of 1857. In 1857, he served as a state judge in the State of Jalisco and in 1862 as the Governor of the State. During the French intervention, Vallarta was in San Francisco, California, until May 1866, when he accompanied Juárez and the Republic was established. He served as Governor of Jalisco again from 1871 to 1875. In 1877 and 1878 he served as Secretary of Exterior Relations under President Porfirio Díaz. In this position, he was instrumental in the United States' recognition of Mexico and worked towards improving relations between Mexico and the United States. He served as president of the Supreme Court of Mexico from 1878 to 1882. IGNACIO L. VALLARTA, DICCIONARIO PORRÚA: HISTORIA, BIOGRAFÍA Y GEOGRAFÍA DE MÉXICO 3668-69 (6th ed. 1995); IGNACIO L. VALLARTA, ENCICLOPEDIA DE MÉXICO 7947 (1987); IGNACIO L. VALLARTA, ENCYCLOPEDIA OF MEXICO: HISTORY, SOCIETY & CULTURE 1516-17 (Michael S. Werner ed., 1997). Vallarta's papers are archived at the Banco de México, Mexico City, and at the Nettie Lee Benson Latin American Collection at the University of Texas, Austin. Biographical studies of Vallarta include: Oscar Castañeda Batres, *Vallarta y la Suprema Corte de Justicia 1881-1882*:

was faced with a difficult yet promising case. A judicial official of a state court, Justo Prieto, had decided that a state statute could not be enforced because it violated the Mexican Constitution and filed an *amparo* action to protect him when he argued against its enforcement.³ Could a state judge in Mexico, however, refuse to enforce a state statute because it was unconstitutional? Although Mexico City is over 1,800 miles from Washington, D.C., across the Rio Grande and an international border, Vallarta knew right where to look for an answer. He turned directly to the pages of *Marbury v. Madison*,⁴ *The Federalist No. 78*,⁵ and Kent's *Commentaries on American Law*.⁶ Vallarta had found the case he had been waiting for, an opportunity to craft Mexican judicial review and to advance the *erga omnes* binding precedential value of the opinions of the judges of his court.⁷ His opinion would predate the United States Supreme Court's use of *Marbury* in this way by more than a dozen years.⁸ His opinion and thought would set the parameters for Mexican debate on judicial review for the next sixty years and leave a lasting mark on Mexican judicial review to the present day.⁹

In an era in which the use of foreign sources by the United States Supreme Court is one of law professors' topics *du jour*,¹⁰ this Mexican example from over 125 years ago has much to contribute.¹¹ In this context,

Semblanza de Ignacio L. Vallarta, in LA SUPREMA CORTE DE JUSTICIA A PRINCIPIOS DEL PORFIRISMO (1877-1882) 1003 (Suprema Corte de Justicia de la Nación ed., 1990); Manuel González Oropeza, *Ignacio L. Vallarta: Una aproximación biográfica*, in LA SUPREMA CORTE DE JUSTICIA A PRINCIPIOS DEL PORFIRISMO (1877-1882), *supra*, at 907; Carlos de Río Rodríguez, *Vallarta: Hombre Universal*, in A CIENTO AÑOS DE LA MUERTE DE VALLARTA 181 (Miguel López Ruiz ed., 1994).

3. See *infra* note 26-40 and accompanying text.

4. 5 U.S. (1 Cranch) 137 (1803).

5. The Avalon Project at Yale Law School, *The Federalist No. 78*, <http://www.yale.edu/lawweb/avalon/federal/fed78.htm> (last visited Sept. 28, 2007).

6. 3 VALLARTA, VOTOS, *supra* note 1, at 383.

7. A decision with *erga omnes* effect may establish a rule of general application rather than being limited in application to only the parties of the dispute. An *erga omnes* obligation is one that is binding on everyone. JAMES R. FOX, *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 102 (3d ed. 2003).

8. ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 120-21 (1989). Chief Justice Fuller used *Marbury* to claim a broad power of judicial review in *Pollock v. Farmers' Loan & Trust*, 157 U.S. 429, 554 (1895).

9. Vallarta's efforts to change the nature of the Mexican Supreme Court has earned him the nickname "el Marshall Mexicano." de Río Rodríguez, *supra* note 2, at 182.

10. See *infra* notes 206-212 and accompanying text.

11. "These are relative heydays for comparative constitutional law scholarship." Ran Hirschl, *On the Blurred Methodological Matrix of Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 39 (Sujit Choudhry ed., 2006).

this study asks not what other countries can do for us, but rather what we have done to or for other countries.¹² The United States Constitution has played an extremely important role in the establishment and development of constitutional orders in Latin America.¹³ It served as a model in drafting Latin American constitutions, and, at times, even United States constitutional commentators and the opinions of United States Supreme Court Justices found their way into the decisions of Latin American supreme court judges.¹⁴ Keith Rosenn writes that in Latin America “the influence of the United States experience with judicial review has been direct and substantial.”¹⁵ This is true, despite the fact such a region “of chronic political instability and short-lived constitutions with a civil law tradition would appear most infertile soil for the seeds of *Marbury v. Madison* to take root.”¹⁶

Marbury now embodies a particular approach to constitutional law and decision making; it is emblematic of the doctrine of judicial review.¹⁷ The decision provides the constitutional cornerstone of the doctrine in the United States and, as a result, supports the core democratic structures of government in this country.¹⁸ With the flurry of scholarship accompanying the recent bicentennial of the decision, it would seem there is hardly anything new left to say about the opinion.¹⁹

12. See ALBERT P. BLAUSTEIN, *THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (1986); CONSTITUTIONALISM AND RIGHTS: *THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (Louis Henkin & Albert Rosenthal eds., 1990).

13. M.C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 108 (2004); ÁNGEL R. OQUENDO, *LATIN AMERICAN LAW* 130 (2006). This article does not address questions concerning present-day attempts to bolster constitutional orders in Latin America through domestic and international efforts. Constitutional courts and judicial review are often seen as parts of these rule-of-law efforts in Latin America, but they are not the only parts. Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 2 (2006) (seeking to understand the broader ways that constitutions become entrenched in Latin America beyond a narrow focus on the judiciary).

14. Jonathan Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth-Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. U. L. REV. 1483, 1544-61 (1997).

15. Keith S. Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L.J. 785, 786 n.7 (1974).

16. *Id.* at 785.

17. See H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239 (2006) (concerning judicial review in Africa, not *Marbury* in Africa).

18. CLINTON, *supra* note 8; WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* (2000) (surveying the changing meaning of the decision in U.S. legal history).

19. The literature on the case and its place in the development of judicial review is massive.

But there is: The decision was also instrumental in the development of Mexican constitutional law, leaving a legacy of constitutional jurisprudence and a broadly construed supreme court power in Mexico. The Mexican Supreme Court would not be the same institution today were it not for *Marbury*. Indeed, the decision is selected here for study because it is representative of Vallarta's consistent recourse to United States materials in the 1880s.

The recognition of this influence in the domestic literature of Latin American countries varies.²⁰ National pride and long-standing political tensions between the United States and many Latin American countries have led some Latin American writers to ignore, gloss over, or underplay United States influence on their country's constitutional development. Similarly, national pride and the revolutionary spirit of 1917 in Mexico may make the United States origins of its constitutional method a difficult fact to accept.²¹ A common Mexican saying is "*Pobre Mexico, tan lejos de Dios, tan cerca de los Estados Unidos.*"²² Reflecting popular disdain for the United States, Mexican historiography has greatly downplayed and for the most part silenced the United States' voice in the development of some of the most fundamental substantive provisions and procedures for the protection of constitutional rights in Mexico.²³

William Nelson's bibliographical essay is a good place to start for the important literature before 2000. NELSON, *supra* note 18, at 127-35; *see also infra* note 252. Bicentennial symposia were held at numerous law schools including "Georgetown, George Washington, John Marshall, Maryland, Michigan, Tennessee, and Wake Forest." Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375, 375 n.1 (2003).

20. It appears that studies of foreign or international sources by Mexican tribunals are uncommon. *See, e.g.,* Jorge Alberto Silva, *Impacto de la doctrina internacional privatista en las decisiones de los más altos tribunales judiciales mexicanos*, 6 REVISTA MEXICANA DE DERECHO INTERNACIONAL PRIVADO 51 (1999).

21. For example, some Mexican authors do not readily admit that *jurisprudencia*, the use of cases to form binding rules of law within the constitutional actions of *amparo*, has its origins in United States law. Matthew C. Mirow, *Case Law in Mexico 1861 to 1919: The Work of Ignacio Luis Vallarta*, in 1 RATIO DECIDENDI: GUIDING PRINCIPLES OF JUDICIAL DECISIONS 226-27 (W. Hamilton Bryson & Serge Dauchy eds., 2006). *Amparo* actions are a group of legislatively created actions to protect constitutional rights, and because of its historical success and importance, it is viewed with great pride by Mexican lawyers and academics. It is, perhaps, the greatest protector of individual rights under Mexican constitutional law. STEPHEN ZAMORA ET AL., MEXICAN LAW 258-74 (2004).

22. "Poor Mexico, so far from God, and so close to the United States." This phrase is attributed to Porfirio Díaz, President of Mexico during Vallarta's tenure on the bench. Alvaro Vargas Llosa, *Como ven los latinoamericanos a los Estados Unidos*, Jan. 3, 2006, <http://www.analitica.com/va/internacionales/opinion/1141416.asp>.

23. The foreign or domestic origin of the *amparo* action is debated. RICHARD D. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE *AMPARO* SUIT 27-34 (1971). *See* Phanor J. Eder,

Furthermore, by not making pre-1917 decisions of the Mexican Supreme Court publicly available on its Internet sites, the Mexican Government effectively creates a false break with the pre-1917 methods of constitutional jurisprudence established in the nineteenth century. As described later in this article, these methods were not discarded in 1917, but were adopted and transformed by post-revolutionary supreme courts charged with constitutional interpretation. The roots of present-day Mexican constitutional methods and even of many of Mexico's core substantive constitutional doctrines are directly attributable to United States law.

This study seeks to give voice to the role of United States law in the development of Mexican constitutional law by situating these developments in both comparative law and legal history discourses. History is the basis of identity, and it is only through history that we know who we are.²⁴ Similarly, by resetting the place of United States law in Mexican constitutionalism, this article provides both a new understanding of the nature and identity of Mexican constitutional law and new insights into the influence of United States constitutional law beyond our borders.

More specifically, this article seeks to expose and to explore the influence United States law had in the creation of Mexican judicial review. The United States origin of judicial review in Mexico had important ramifications for the doctrine's continuation to the present day, and this article seeks to place this origin and the transformation of this doctrine into historical and legal context. Part I of this article presents the overwhelming evidence that Mexican judicial review is borrowed directly from United States law. The opinion of the Mexican Supreme Court in the Prieto *Amparo* action is placed in the context of the individual outlook of its author and Mexican history more generally. Part II traces the development of the doctrine through Mexican law to the present day, noting particular instances where the "foreignness" of the doctrine or of Vallarta's method played into the strength or weakness of its use. Part III of this article examines this history in light of recent debates concerning the transplantation and borrowing of foreign law by domestic supreme courts,

Judicial Review in Latin America, 21 OHIO ST. L.J. 570 (1960) (downplaying the role of U.S. influences on judicial review). Héctor Fix-Zamudio, *La independencia judicial en México*, in 1 DERECHO CONSTITUCIONAL COMPARADO MÉXICO-ESTADOS UNIDOS 382 (James Frank Smith ed., 1990) does not mention the role of Vallarta and *Marbury*. See also Rolando Tamayo y Samoran, *La formación de la doctrina del amparo. La contribución de Ignacio L. Vallarta. Una curiosa paradoja*, in LA SUPREMA CORTE DE JUSTICIA A PRINCIPIOS DEL PORFIRISMO (1877-1882), *supra* note 2, at 1093-108 (discounting United States influence on the development Mexican *amparo* and judicial review).

24. See R.G. COLLINGWOOD, *THE IDEA OF HISTORY* 18, 226-27 (1993).

and the migration of constitutional ideas. It also examines this history in light of the work currently re-assessing the aims and interests of appropriators of foreign materials within domestic battles for political, economic, and legal power. The final portion notes that Vallarta's use of *Marbury* in 1881 to assert the Mexican court's power to declare statutes unconstitutional and null actually antedates the United States Supreme Court's "discovery" of the case's judicial review aspect in 1895 in *Pollock*.²⁵

I. The Birth of Judicial Review in Mexico: The Prieto *Amparo*

The dispute leading the Mexican Supreme Court to invoke the doctrine of judicial review and to rely extensively on the reasoning of Justice Marshall in *Marbury* is complex.²⁶ Before addressing Vallarta's opinion in detail, a brief overview of the dispute may help guide the reader. In 1881, Justo Prieto was a lawyer who held an official position of legal advisor (*asesor*) to a state judge in Hidalgo, Mexico.²⁷ Prieto advised the judge that some fugitive servants who had been imprisoned according to a state law should be released because the state law violated the federal constitution.²⁸

A higher-level state tribunal made a preliminary determination that Prieto had given advice contrary to law (a violation of state statute) and suspended Prieto from serving as a legal advisor for two months. With his trial for the crime of giving advice contrary to law pending before the state court, Prieto sought protection in a federal court from the actions of the state courts and their violations of his individual rights under the Mexican Constitution. The action he filed in the federal court was an action to protect his constitutional rights, called an *amparo* action.²⁹ A lower federal court granted some relief to Prieto, but the Mexican Supreme Court granted even more relief by revising the lower federal court's decision and protecting Prieto completely.³⁰ It is in the context of granting full

25. CLINTON, *supra* note 8, at 120-21.

26. 3 VALLARTA, VOTOS, *supra* note 1, at 383-429.

27. *Id.* at 383. For "*asesor*" see M.C. Mirow, *Latin American Legal History: Some Essential Spanish Terms*, 12 LA RAZA L.J. 46 (2000).

28. 3 VALLARTA, VOTOS, *supra* note 1, at 383. Then, as today, Mexico is a federal country with executive, legislative, judicial, and administrative governmental functions occurring at both levels. There are, of course, many areas of exclusive competence at both the state and federal level. ZAMORA ET AL., *supra* note 21, at 102-13. The dispute in this case arose originally in Hidalgo, in the State of Chihuahua, approximately 250 miles south of El Paso, Texas.

29. See ZAMORA ET AL., *supra* note 21.

30. 3 VALLARTA, VOTOS, *supra* note 1, at 383.

protection to Prieto that Vallarta, President of the Mexican Supreme Court, turned to *Marbury* to determine that his court had the power to review state legislation for unconstitutionality and to protect Prieto.

A. Vallarta's Opinion

Early in 1881, Saturnio Leon and six other servants of Tomás Núñez brought an action before the judge of Hidalgo. They claimed that Núñez was holding them in slavery though unjustified debt peonage.³¹ A representative for Núñez claimed that the servants had committed the crime of fleeing their servitude, a crime established by the laws of the State of Chihuahua.³² A local judge in Hidalgo was ordered to seize the servants and they were imprisoned. After five days of imprisonment, the servants wrote to the same judge complaining that they were being held in violation of their individual guarantees.³³ The judge passed the writing to Justo Prieto, the judge's legal advisor (*asesor*), for a legal analysis of the servants' situation.³⁴ Prieto issued his opinion (*dictámen*): The Chihuahua law violated seven articles of the Mexican Constitution of 1857.³⁵ On reading Prieto's advice to the local judge, the Tribunal of the State of Chihuahua found the opinion to be disrespectful and groundless. Prieto had sought to revise a decision of a court and counseled the judge to disobey the law.³⁶ In the court's view, Prieto had violated the following law:

The Magistrate or Judge who through lack of instruction or through inexcusable lack of care decides against the express law . . . shall be suspended from employment and salary of two months to a year. . . . An *asesor* who provides an opinion against the express law shall incur the same punishments.³⁷

31. 3 VALLARTA, VOTOS, *supra* note 1, at 384 n.1.

32. *Id.* at 385-86; Ley 7, Sec. 11 de "la coleccion del Estado."

33. 3 VALLARTA, VOTOS, *supra* note 1, at 386.

34. *Id.* at 383.

35. *Id.* at 386. The articles violated were Article Five (prohibiting work without compensation and consent), Article Fourteen (prohibiting retroactive laws), Article Sixteen (prohibiting disruption of person, family, home, papers, and possessions without a written order from a competent authority), Article Seventeen (prohibiting imprisonment for debt of a purely civil character), Article Eighteen (prohibiting imprisonment for failure to pay money), Article Nineteen (prohibiting imprisonment for more than three days without justification), and Article Twenty (setting out rights of accused to know the reason for imprisonment and the name of accuser, in addition to other procedural criminal rights).

36. *Id.* at 386-87.

37. *Id.* at 319 (citing COLECCIÓN DE LEYES DEL ESTADO DE CHIHUAHUA, 319).

Prieto was punished with a suspension of his position of *asesor* for two months and the court referred his actions to a separate panel of the court (the *Primera Sala*) to determine whether Prieto had acted against the express law. The State of Chihuahua ordered the local judge to carry out the imprisonment of the servants.³⁸ Finding that Prieto had knowingly acted against the law of the state, the Court of Chihuahua suspended Prieto's rights as a citizen of Chihuahua and him of his positions of *asesor*, lawyer (*abogado*) and government official (*subalterno*).³⁹ Further criminal action against Prieto was to be brought before another panel of the Tribunal of the State of Chihuahua (the *Segunda Sala*). At this point, Prieto sought protection of his constitutional rights, through an *amparo* action, from the federal District Judge of Chihuahua.⁴⁰ The decision of the District Judge found its way to the Mexican Supreme Court, where Vallarta served as President.

Vallarta first noted that the district court decision did not take article 126 of the Mexican Constitution into account. Importantly, this provision states:

This Constitution, the laws of Congress of the Union that emanate from it and all treaties made or which shall be made by the President of the Republic with the consent of the Congress, shall be the supreme law of the entire Union. The judges of every State shall be bound (*se arreglarán*) by the said Constitution, laws, and treaties, despite dispositions to the contrary that may be had in the Constitutions or laws of the States.⁴¹

With this constitutional provision in mind, Vallarta was ready to consider Prieto's culpability. Vallarta rephrases the essential issue several ways: "Can a state law set up the obedience of judges under article 126 of the Constitution, which obliges their being bound to it, as a crime, despite dispositions to the contrary that may be had in the Constitutions or laws of the States?"⁴² "Does a judge or *asesor* who decides against a law that is adjudged unconstitutional commit a crime?"⁴³ "Can one punish the duty to

38. *Id.* at 387.

39. *Id.* at 387 n.1.

40. *Id.* at 388-89.

41. Constitución Política de la República Mexicana de 1857 [Const.] art. 126 (Mex.); cf. U.S. CONST. art. VI, § 2 (*infra* note 48).

42. 3 VALLARTA, VOTOS, *supra* note 1, at 390.

43. *Id.* at 391.

observe the preference of the Constitution over any law that contradicts it?"⁴⁴ Framed this way, Vallarta raised the question of judicial review of statutes as the fundamental issue linked to Prieto's guilt.

Vallarta responded to these questions about judicial review in several ways: by addressing the function of the judge, the nature of article 126, and the reasons for incorporating the article into the Mexican Constitution. He adopted large portions of his argument from a legal opinion he wrote as a lawyer representing a client in an *amparo* action in 1870.⁴⁵ Vallarta's opinion first responds to a criticism the Tribunal of Chihuahua levied against Prieto—that his advice made law, rather than followed the established law.⁴⁶ Vallarta defended Prieto's advice this way, "in this case that falls under the governance of constitutional law, it is not a maxim, but an error, that 'judex non de legibus, sed secundum leges judicare debet.' Here the judge ought to judge the state law, with the effect of determining its unconstitutionality towards the end of judging always according to the Constitution."⁴⁷ Later in his opinion, Vallarta confronted the aversion those who had been schooled in Roman law, and who learned that "the judge does not judge the law," must have experienced upon hearing his theory of judicial review.⁴⁸ For Vallarta, however, article 126 of the Mexican Constitution mandated this alteration of the judge's traditional scope of activity. Indeed, Vallarta stated that this provision led to a "profound revolution" in Mexican jurisprudence.⁴⁹ Its proper interpretation now became the task of Vallarta's opinion.

Vallarta first noted that article 126 is nothing but a literal translation of the Supremacy Clause of the United States Constitution.⁵⁰ Vallarta then

44. *Id.*

45. *Id.* at 393, 406. I have been unable to locate this legal opinion by Vallarta as attorney for Antonio Lozano. I have not searched the Banco de México Vallarta papers and have only done a preliminary search of the Nettie Lee Benson collection of Vallarta papers at the University of Texas. Manuel González Oropeza reports that Vallarta cited Kent's *Commentaries*, *The Federalist* No. 78, and *Marbury* in this legal opinion he wrote for the *amparo* of Antonio Lozano. Vallarta was the attorney for Lozano, and it appears that his legal opinion was subsequently printed as *Informe pronunciado ante la 1a. Sala de la Corte de Justicia de la Nación, por el Lic. Ignacio L. Vallarta en el juicio seguido contra Don Antonio Lozano sobre el secuestro de todos sus bienes conforme a la ley de 31 de enero último* (Imprenta de Ignacio Escalante y. Cd. México, 1870). González Oropeza, *supra* note 2, at 924.

46. 3 VALLARTA, VOTOS, *supra* note 1, at 394. The Tribunal of Chihuahua noted the civil law maxim as reported in the *Recopilación Septima, número 125*, "Judex non de legibus sed secundum leges judicare debet." *Id.* at 389.

47. *Id.* at 394.

48. *Id.* at 397.

49. *Id.* at 394.

50. U.S. CONST. art. VI, § 2 states:

argued that the intent of the Mexican Constituent Congress was "to give Mexico the same institutions that govern in the United States."⁵¹ Vallarta had been a delegate for the State of Jalisco at the Constituent Congress in 1856 and 1857; he was familiar with similarities between the Mexican Constitution of 1857 and the United States Constitution of 1787.⁵² Just as civilians search for the meaning of code provisions in Roman law, Mexican constitutionalists must look to United States law as an interpretative guide because so many Mexican constitutional provisions are borrowed from the United States Constitution.⁵³ Vallarta saw this method as following from a scientifically and philosophically sound search for the meaning of the law rather than from, in his words, "an immodest itch to imitate the foreign."⁵⁴

With this methodological justification, Vallarta rolled out his United States sources, including two pages from Kent's *Commentaries on American Law*, several quotes from *The Federalist No. 78*, and about four pages extracted from *Marbury*.⁵⁵ Vallarta translated the pages from Kent's *Commentaries* to establish the duty of judges to determine the constitutionality of statutes and to both interpret and fix the meaning of constitutional provisions.⁵⁶ Vallarta concluded his use of Kent's *Commentaries* to assert that "the duty to declare null and of no value a law enacted in violation of the Constitution belongs to the judicial power."⁵⁷

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

51. 3 VALLARTA, VOTOS, *supra* note 1, at 394-95.

52. EMILIO O. RABASA, HISTORIA DE LAS CONSTITUCIONES MEXICANAS 78 (1994).

53. 3 VALLARTA, VOTOS, *supra* note 1, at 395. The United State Constitution of 1787 was a principal source for the drafters of the Mexican Constitution of 1824. In turn, the Constitution of 1824 was an important source for the Constitution of 1857, which influenced many of the provisions of the Constitution of 1917. RABASA, *supra* note 52, at 17, 67, 98; *see also* ZAMORA ET AL., *supra* note 21, at 233.

54. 3 VALLARTA, VOTOS, *supra* note 1, at 395. Vallarta was not shy about his comparative method. In one case, Vallarta states that he will "study the present question in the light of comparative legislation." *Id.* at 57. In this same case, after noting the similarities between the United States and Mexican constitutional texts and quoting Marshall's opinion in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), Vallarta begins his analysis by stating "we can now make the observations suggested by the comparative study of the two texts." 2 VALLARTA, VOTOS, *supra* note 1, at 60. The usefulness of "comparative legislation," and indeed of the study of English in understanding and interpreting the Mexican constitution, had already made some headway in Mexican legal curriculum by this point. MIROW, *supra* note 13, at 117-18.

55. These passages are set out in the appendix with parallel citations to their sources. *See infra* app.

56. 3 VALLARTA, VOTOS *supra* note 1, at 396-97.

57. *Id.* at 397.

Vallarta found further support for judicial review in Alexander Hamilton's declaration that "no law contrary to the Constitution can be valid."⁵⁸ Tracking *The Federalist No. 78*, Vallarta asserted that it falls upon the judiciary to determine whether a statute runs afoul of the Constitution.⁵⁹

Vallarta continued to call upon the persuasiveness of United States authority. His opinion next translated and extracted over fifteen paragraphs from *Marbury*.⁶⁰ These paragraphs again set out constitutional supremacy and the duty of the judiciary both to interpret the constitution and to subject legislation to constitutional scrutiny.⁶¹ Vallarta tracked Marshall's well-known exposition as follows. The constitution expresses the "original and supreme will of the people."⁶² It organizes the government, and it defines and limits the legislative power.⁶³ When a statute is contrary to the constitution, either the statute or the constitution must be given effect.⁶⁴ Marshall, of course, opted for the constitution and asked whether, if a law has no effect, it still obligates tribunals to follow it.⁶⁵ The answer is no; to decide otherwise would give the legislature an omnipotence that it does not have under a written constitution that sets out limited legislative powers.⁶⁶ The judicial power is the proper place for such determinations.⁶⁷ As further support, but without quoting them, Vallarta cites other works from the United States,⁶⁸ including Story's *Commentaries on the Constitution*,⁶⁹ Paschal's *Annotated Constitution*,⁷⁰ and Curtis's *History of the Constitution*.⁷¹

Vallarta comfortably transplanted these sources to Mexican jurisprudence:

58. *Id.*

59. *Id.* at 398.

60. *See id.* at 399-402.

61. *Id.*

62. *Id.* at 399.

63. *Id.*

64. *Id.* at 339-400.

65. *Id.* at 400.

66. *Id.*

67. *Id.* at 402.

68. *Id.*

69. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Fred B. Rothman & Co. 1991) (1833).

70. GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED (1868).

71. GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES (William S. Hein & Co. 2006) (1854-1858).

These theories are so applicable to our constitutional law, that they may be well considered as its rationale and philosophical exposition; an abstraction gathered from American commentators, their reasoning so compelling that, accepting the text of article 126 of our Constitution, it is necessary to come to the conclusions they sustain: the law is the same here and in the United States, its philosophy, its sense, ought in both countries to be the same, the scientific authority of the texts I have cited is unimpeachable for us.⁷²

Vallarta also examined the relatively scant support available in Mexican materials. Statements made during the drafting to the Constitution in 1857 supported the power of judicial review, and Vallarta analogized to the clear case of a retroactive statute being unconstitutional and of no effect under Mexican law.⁷³

Concluding his discussion of judicial review, Vallarta asserted that tribunals could not apply statutes that were contrary to the Constitution and that it was the duty of tribunals to make such determinations.⁷⁴ Without this power in the judiciary, the Constitution, and hence the entire political structure, would crumble.⁷⁵ This view, however, changed the judicial function dramatically, and Vallarta recognized the discomfort his assertions of judicial review would produce in judges trained in the civil law:

It is right, it is obligatory for the judge to judge the conformity of the secondary law with the fundamental law, so that it is not applied, so that what is contrary to the fundamental law is not obeyed. It is only the Constitution that no judge may judge, but all must obey it and carry it out. It is only to this supreme law, and to no other, that today among us is applicable the rule of Roman jurisprudence, "Judex non de legibus, sed secundum leges judicare debet."⁷⁶

Having determined the applicable rule of law, Vallarta analyzed Prieto's actions. To respond to an important concern, Vallarta first recognized the potential for abuse by judges who might wish to circumvent state law under the guise of unconstitutionality. Vallarta then read article 126 to mean that state judges may not neglect the duty to examine the constitutionality of such laws because the Constitution is the supreme law

72. 3 VALLARTA, VOTOS, *supra* note 1, at 402-03.

73. *Id.* at 403-05.

74. *Id.* at 405.

75. *Id.* at 406.

76. *Id.* at 407. The maxim instructs judges not to judge the laws, but to judge according to the laws.

by which a judge must examine all laws.⁷⁷ Abuses by state judges are checked by the power of superior tribunals to review their decisions and to sanction them directly.⁷⁸ The final word on the constitutionality of a law rests with the supreme court, and Vallarta analogized again to the jurisdiction of the United States Supreme Court through its use of the common law writ of error.⁷⁹

Vallarta found Mexican law deficient on this procedural aspect. The existent actions of *amparo* and *de competencia*⁸⁰ were not broad enough to reach all lower and state court decisions addressing the constitutionality of a legislative act.⁸¹ Although the Mexican Constitution gave the federal courts jurisdiction over “all controversies arising under the fulfilling and application of federal laws,” the provision had led neither to legislation affirming this jurisdiction nor to the assumption of this jurisdiction without legislative grant.⁸² Despite the respect Vallarta had for the *amparo* action (his comparative study found it superior to habeas corpus) Vallarta again turned to the United States for a solution.⁸³

If the constitutional provisions are the same, and if one can use Kent’s *Commentaries*, *The Federalist Papers*, and *Marbury* to understand Mexican law, it is not too much of a stretch to suggest that Mexico follow the Federal Judiciary Act of 1789:

And the method of filling this fatal gap in our law is not difficult; it is shown by the legislators of the country whose institutions we have imitated: by adapting the precepts of the law of September 24, 1789 to our needs, a question otherwise embarrassing to the present state of our legislation will stand resolved.⁸⁴

This passage indicates how Vallarta sought to grant writ of error

77. *Id.* at 408-11.

78. *Id.* at 411-12.

79. *Id.* at 412-13. In discussing the writ of error, Vallarta referred to his published work on the topic found in his comparative study of *amparo* and the writ of habeas corpus. IGNACIO L. VALLARTA, *EL JUICIO DE AMPARO Y EL WRIT OF HABEAS CORPUS: ENSAYO CRÍTICO-COMPARATIVO SOBRE ESOS RECURSOS CONSTITUCIONALES* (1881) [hereinafter VALLARTA, *JUICIO*].

80. An action *de competencia* would have been an action to determine the proper jurisdiction of a court over a dispute. ZAMORA ET AL., *supra* note 21, at 686.

81. 3 VALLARTA, *VOTOS*, *supra* note 1, at 413.

82. *Id.*

83. *Id.* at 414.

84. *Id.*

jurisdiction to the Mexican Supreme Court.⁸⁵ Indeed, others had noted the absence of this jurisdiction and proposed legislation to grant it.⁸⁶ Having noted this gap in the constitutional law of Mexico, Vallarta turned to resolving the dispute before the court. Vallarta indicated that writ of error jurisdiction would have been of use to ensure that all questions of constitutional law could come before the supreme court.⁸⁷ Nonetheless, in the case before Vallarta there was not a problem: *amparo* was sufficient to have Prieto's claim before the court.⁸⁸

Vallarta insisted that the court would not determine whether Prieto's interpretation (the servants could not be obliged to pay their debts through personal services) or the Tribunal's interpretation (the constitutional article had no application to servants who had been paid beforehand and who had promised to work) was correct.⁸⁹ Instead, the constitutional issue before the court was whether Prieto knowingly gave counsel against the law. Because the duty to determine the constitutionality of all statutes rests on all judges, Prieto, as *asesor* to the judge in Hidalgo, had fulfilled his duty and committed no crime.⁹⁰ Indeed, Vallarta likely agreed with Prieto's interpretation, noting that Prieto had relied on decisions of the Mexican Supreme Court in reaching his conclusions.⁹¹ A formal judgment (*sentencia*) of the court follows in Vallarta's report of the case. It is six pages long and is in a typical civil law format including brief recitations of the procedural history, facts, and legally applicable rules. It concludes by granting Prieto constitutional protection from the proceedings of the Tribunal of Chihuahua.⁹²

In the context of this case, Vallarta asserted the power of his court to undertake judicial review of a state statute and established that all judges were bound to the Mexican Constitution as the highest level of legal authority from which to form their legal opinions. Vallarta, with heavy reliance on *Marbury*, asserted not only judicial review but also the supremacy of the federal constitution even for state judges. We must place

85. *Id.* at 413.

86. *Id.* at 414-15 (discussing the proposed legislation of Sr. Mata in Congress, Jan. 12, 1869).

87. *Id.* at 416.

88. *Id.*

89. *Id.* at 416-17.

90. *Id.* at 417-18 ("Finally in 1988, state and local courts were denied the power to directly interpret the constitutionality of laws or to refrain from enforcing or applying laws that were contrary to the Constitution."); ZAMORA, *supra* note 21, at 263.

91. 3 VALLARTA, VOTOS, *supra* note 1, at 420, 422.

92. *Id.* at 423-29.

this decision in the context of Vallarta's broader thought to appreciate properly the astounding leaps Vallarta appears to have made.

B. Vallarta, *Marbury*, the *Votos*, and the *El Juicio de Amparo*

Although he only served on the supreme court for four years, Vallarta substantially transformed the institution in this short period. Indeed, some commentators have equated this brief tenure to John Marshall's thirty-four years on the United States Supreme Court in terms of its influence on the nature and position of these courts in the political structures of their respective countries.⁹³ Vallarta defined the place of the supreme court in the constitutional constellation of Mexico, established the idea that case law could serve as binding rules of precedent in many constitutional actions, and defined the jurisdiction of the court.

Unlike most Mexican judges of his era, Vallarta left a substantial body of written work revealing his judicial reasoning and his analysis of constitutional difficulties while serving as President of the supreme court. During this period he wrote substantial legal works leaving no doubt about the influences legal sources and judicial methods had on his ideas. These works include his *Cuestiones constitucionales: Votos*,⁹⁴ which provided annotated decisions in four volumes, and a comparative treatise on the *amparo* action and the writ of habeas corpus.⁹⁵

Vallarta's central work for constructing a jurisprudence of Mexican constitutional law is the *Votos*. The four volumes, published between 1879 and 1882, contain about 1,600 pages and report on fifty cases of major constitutional import. Vallarta explained his reasons and methods for writing and publishing the opinions in the *Votos*. He made it quite clear that he believed he was doing something new and important for Mexican constitutional law by reporting his reasons behind various constitutional cases. That Vallarta had the United States in mind with this approach is beyond doubt.⁹⁶ He wrote:

93. See Héctor Fix-Zamudio, Ignacio Luis Vallarta. *La incompetencia de origen y los derechos políticos*, in *A CIEN AÑOS DE LA MUERTE DE VALLARTA* 25 (Miguel López Ruiz ed., 1994).

94. VALLARTA, *VOTOS*, *supra* note 1.

95. VALLARTA, *JUICIO*, *supra* note 79.

96. The *Votos* are a remarkable collection of cases. Each case reported in the *Votos* follows the same basic structure. The title of the case is followed by a particular legal question, and sometimes the constitutional provision at issue in the case is stated. Vallarta then provides a brief recitation of the facts and procedural history. Following this introductory material, Vallarta sets out his reasoning in his opinion of the case. These sections run from ten to over one hundred pages of text and read much like United States Supreme Court opinions of the era. After setting out the reasoning of the decision, the last section of the report gives the official sentence or

The Constitution of Mexico is more complete, more perfect than the Constitution of the United States; the latter has more gaps than the former. The good sense of the American people, however, has never rejected the work of its elders, and instead of searching for novelties to change institutions, has not corrected the defects of its fundamental law until experience has strongly suggested reform. On the other hand, the constant work of publicists, the repeated and laborious decisions of the tribunals of the United States, not only have filled these gaps, leaving the work of Washington, Hamilton, Franklin, and Madison intact, but also have formed the most complete constitutional jurisprudence of a free people. If this publication succeeds in sparking the desire to imitate this wise and patriotic conduct of our neighbors, if it serves to stimulate the study of constitutional law, even far from the heat of political battles, if it may be perhaps a grain of sand in the building the Mexican Republic is yet to construct, its constitutional jurisprudence, then all my hopes in producing this collection will be satisfied.⁹⁷

Vallarta directly referred to the opinions of the United States in the introduction to the second volume of the *Votos* and made it clear that reproducing this method of interpretation in Mexican constitutional law was his goal:

If, as I well believe, I have never been able to imitate the conduct of

ejecutoria in the usual style of the civil law: "Taking note of and considering various facts and legal sources, the court decrees *X* and the judges subscribe the decree."

A brief illustration of his method in the *Votos* reveals the thought process Vallarta brought to his work of constitutional interpretation. A report of a case of about ten pages has the following structure and argument. The case begins with the title "*Amparo* brought against the resolutions of a district judge." 1 VALLARTA, VOTOS, *supra* note 1, at 196. Vallarta then states the issue of the case this way: "[C]an an action of *amparo* be brought against the acts of district judges? Interpretation of article 101, paragraph 1 of the Constitution." *Id.* He follows this with a factual and procedural summary of the case. *Id.*

Vallarta began his analysis of the case by stating the legal question presented for resolution. He stated: "This case which has just been considered neatly formulates this important question: Can an action of *amparo* be brought against the acts of district judges? And the court has the duty to face and resolve this question despite the difficulties that surround it to determine once and for all the constitutional jurisprudence on this point." *Id.* Several pages of analysis follow, as Vallarta sets out the reasoning for his decision. *Id.* at 198-204.

After this full discussion of Vallarta's arguments, the report then provided the formal judgment of the court after the heading, "The Supreme Court pronounced the following judgment." *Id.* at 204. Vallarta here shifted from his common-law constitutional method to the civil law form of reporting. The formal judgment sets out the factual and procedural history of the case followed by several paragraphs beginning with the word "considering." *Id.* at 204-05. These paragraphs recapitulate the argument in this more formal structure and give the judgment of the court. *Id.* The structure just described is typical for each case reported in the *Votos*.

97. *Id.* at vi.

the wise North American judges, who, with their "opinions," have formed the most complete constitutional jurisprudence of a free people, at least I have the satisfaction of having tried, and I am heartened by the hope that judges more capable than I will obtain this.⁹⁸

A system of binding precedent was essential to this undertaking, and Vallarta was keenly aware of this. At another point in the *Votos*, Vallarta advanced the use of cases to establish binding rules of law. He wrote:

This is the way the North Americans have understood it, and with fewer constitutional laws than we have, and with more gaps in their Constitution than those contained in ours, they possess in the judgments of their tribunals the most complete constitutional jurisprudence a people could want. There, *one opinion* of Marshall is worth as much as a law, and laws are the *leading cases*, decided by its tribunals. Hundreds of judgments may be cited upon which to base their resolutions, not in laws that do not exist, but in prior judgments that settle the constitutional question they treat . . . Why among us does the opposite happen and it is said that the judgments of the Court are not authority nor doctrine to solve similar cases? We trust that once the ends of *amparo* are better known, it will not continue to be believed that it is limited to protecting an individual, but that it may be understood to extend to fix the public law by means of the interpretation it makes of the fundamental law.⁹⁹

Vallarta was well aware that a system of binding precedents was an essential corollary to the power of judicial review. He worked tirelessly to establish a system of binding reported opinions of precedential value, called *jurisprudencia* in Mexico.¹⁰⁰ In addition to his work in the *Votos*, Vallarta asserted the importance of both judicial review and binding precedents in a treatise he wrote comparing the *amparo* action to the writ of *habeas corpus*.¹⁰¹

It was within the context of the *Amparo* Act of 1882 that Vallarta was able to establish firmly this doctrine in Mexican constitutional law.¹⁰²

98. 2 *id.* at iv-v.

99. 4 *id.* at 497-98. In fact, Vallarta was able to establish the binding role of cases in Mexican *amparo* actions through his drafting of the *Amparo* Act of 1882. Under the provisions of this act, five consecutive decisions on the same point becomes a binding rule of law in Mexico. The specifics of this rule, *jurisprudencia obligatoria*, are, of course, quite complex.

100. The development of this doctrine by Vallarta is explored more fully in Mirow, *supra* note 21.

101. VALLARTA, JUICIO, *supra* note 79, at 11-21.

102. Vallarta's draft of the act and supporting statements are found in LA SUPREMA CORTE

Several provisions of the act advance the doctrine. One article states that tribunals are bound by decisions that interpret the constitution.¹⁰³ Another article requires that opinions be based on the applicable constitutional text and requires that the opinions of the supreme court and of doctrinal sources be given weight in interpreting the constitution.¹⁰⁴ A third article sets out a numerical requirement in *amparo* cases.¹⁰⁵ When five decisions come to the same legal conclusion, they create a *jurisprudencia* of repetition (*jurisprudencia por reiteración*), a binding set of precedential decisions that must be followed by judges.¹⁰⁶ If a judge does not follow the rule established by past decisions, punishment follows. The creation of binding *jurisprudencia* in *amparo* actions was justified because the constitution implicitly provided this method of establishing rules through case decisions; it followed from the supreme court being the supreme interpreter of the constitution. Vallarta's writings do not give any reason why five cases were selected as the applicable number.¹⁰⁷ Nonetheless, this threshold limit for punishing a judge became a minimum for the creation of a binding series of cases.

Vallarta's drafting of the *Amparo* Act of 1882 and the publication of the *Votos* went hand in hand. The legislative project establishing binding precedents meant that the *Votos* could take a more important place in the firmament of Mexican constitutional law. Thus, with the reports in his

DE JUSTICIA A PRINCIPIOS DEL PORFIRISMO (1877-1882), *supra* note 2, at 490-501. The binding aspect of case law comes up in several sections of the act as submitted by Vallarta: they are, as numbered in the original draft:

Article 37. Decisions pronounced by judges shall always be based on the applicable constitutional text. For its proper interpretation, attention shall be paid to the meaning given in the opinions of the Supreme Court and the writings [*doctrina*] of authors.

Article 44. Decisions of the Supreme Court ought to state the reasons the tribunal considers sufficient for its interpretation of the constitutional texts and to resolve, by the application [of these reasons], the constitutional questions addressed. When the votes on decisions are not unanimous, the minority shall also set out in writing the reasons for its dissent.

Article 73. The grant or denial of *amparo* against the text of the Constitution or against its fixed interpretation by the Supreme Court, by at least five uniform opinions, shall be punished with the loss of employment and imprisonment from six months to three years if the judge has acted fraudulently [*dolosamente*], and if by lack of instruction or care, with suspension of functions for one year.

103. See art. 73, *supra* note 102.

104. See art. 37, *supra* note 102.

105. See art. 73, *supra* note 102.

106. See *id.*

107. Miguel Carbonell y Sánchez, *Una aproximación al surgimiento histórico de la jurisprudencia en México*, 45 REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO 63, 70-71 (1995). There is nothing in Vallarta's *Votos* or his *El juicio del amparo* that indicates why he selected this number of cases.

Votos, Vallarta hoped to build the constitutional jurisprudence of Mexico which courts were now statutorily obligated to follow. Although the work must have fit well with his professional and economic goals, Vallarta stated that the work was motivated by a sense of patriotic duty and of necessity following from his presidency of the supreme court.¹⁰⁸ The *Votos* would also establish Vallarta's legacy as the central authority in Mexican constitutional interpretation. Indeed, he undertook this task for a court that had been newly constituted in 1877 and which sought to establish its political place in the Mexico of Porfirio Díaz.¹⁰⁹

The use of United States sources in the Prieto *Amparo* was not unusual for Vallarta.¹¹⁰ In fact, Vallarta's opinions in the *Votos* directly and unapologetically relied on the constitutional jurisprudence of the United States. Of the fifty cases reported in the *Votos*, thirty-two (or nearly two-thirds) use, and analogize to, United States constitutional law. Making such frequent use of United States law, Vallarta justified his recourse to these sources through various means, including the textual similarity between the two constitutional texts, the sound reason of the United States sources, and the lack of Mexican sources on particular topics.

Just as article 126 was a literal translation of the Supremacy Clause of the United States Constitution in the Prieto *Amparo*, the frequent textual similarity between the two constitutions was used to justify parallel interpretations. In another case, Vallarta wrote:

The present article 16 was the 5th in the draft constitution, and reading this, it is now understood that the principal object of the commission was to implant in our fundamental law the precept contained in the [F]ourth [A]mendment of the United States Constitution. The similarity between the two texts is such that, saving certain traditional doctrines of our jurisprudence that were inserted into article 5, it is now seen that the one is nothing but a translation of the other. It is appropriate then first of all to understand the spirit of the law, to study its history, its rationale, its origin, figuring out, although very briefly, what meaning is given by our neighbor Republic to the precept that the commission wanted to copy.¹¹¹

108. 2 VALLARTA, VOTOS, *supra* note 1, at iv. The publication of case reports by private individuals have always been linked to their possible sale. I thank Professor Thomas E. Baker for this point. Vallarta's attempts to market the *Votos* is evident from my quick reading of some of Vallarta's uncatalogued correspondence now at the Benson Collection at the University of Texas, Austin.

109. LUICO CABRERA ACEVEDO, LA SUPREMA CORTE DE JUSTICIA EN EL PRIMER PERIODO DEL PORFIRISMO 1877-1880, at 26-27 (1990).

110. The following paragraphs are adapted from Mirow, *supra* note 21.

111. 1 VALLARTA, VOTOS, *supra* note 1, at 71.

The textual similarity between the Mexican Constitution and the United States Constitution provides an interpretative trope that is found throughout the *Votos*. In one opinion, Vallarta appealed to United States law on general terms when institutions are similar, “[T]o consult its laws is for us almost a necessity when we want to make a study of comparative constitutional legislation, given the similarity of our institution with those of that country.”¹¹² Vallarta asserted the same method again in another case this way: “It is not necessary to advise that the reason and motives to the American constitutional texts are also the reason and motives of ours on this point. Keeping in mind the similarity that exists between them and between the institutions of the two Republics, this truth cannot be denied.”¹¹³ Vallarta continued in the same case, “I do not have to say that the theories that I defend are American, well-known by the commentators and sanctioned by the tribunals of that Republic.”¹¹⁴ Vallarta also argued that in the absence of Mexican authorities on constitutional law, United States sources should be preferred:

Without doctrine, without precedents, without opinions among us, these grave questions have at the same time a complete novelty and an indisputable importance. As delicate and difficult as the resolution is, I have not wanted to trust in my own reasoning, but I have gone to the source of our constitutional law, to the American jurisprudence, in search of the doctrines that illustrate my opinion, searching for the foundation of the vote that I shall give. And I ought to say once and for all I have found them so solid and robust that I think they will satisfy, as they satisfy me, whoever studies and mines these important materials. Here are the American ideas stated by their most respected authors¹¹⁵

The parallelism of constitutional provisions enabled Vallarta to rally a significantly broad range of sources from the United States in his interpretation of the Mexican constitution. In one case, for example, Vallarta tackled the question of the court’s ability to review state legislative action. Noting that the Mexican constitutional provision was a translation of the Fourth Amendment, Vallarta called on the writings of Story, *The Federalist Papers*, and Paschal’s *Annotated Constitution* to find this

112. *Id.* at 133.

113. 2 *id.* at 31.

114. *Id.* at 31.

115. *Id.* at 14.

power.¹¹⁶ Thus, the method that enticed Vallarta to call on *Marbury* for the Prieto *Amparo* is found throughout the *Votos*. When the taxing power of the federal government came up, Vallarta looked to Marshall's opinion in *McCulloch v. Maryland*.¹¹⁷ In a case where the definition of imports and exports arose, Vallarta quoted extensively from *Brown v. Maryland*.¹¹⁸ When considering whether Mexico's admiralty jurisdiction ran to inland navigable rivers, Vallarta consulted Justice Campbell's opinion in *Jackson v. Steamboat "Magnolia"* and several other United States admiralty jurisdiction cases.¹¹⁹

To place Vallarta's use of *Marbury* and other United States constitutional sources into context, mention must be made of the sources he used to present and to expound United States law. His citations indicate that on occasion he appeared to work directly from published opinions of the United States Supreme Court, but his preference was to use standard treatises on United States law. This practice most likely reflected the sources available to him, but may also have been part and parcel of his civil law training. When using works from the United States, Vallarta almost always placed the translated text of the work in his main text and the original English text in his footnotes.

Vallarta used many secondary sources to support his overall project of constructing Mexican constitutional law in the image of United States law. He frequently employed selections from *The Federalist Papers*.¹²⁰ Vallarta relied frequently on Story's *Commentaries on the Constitution*¹²¹ and Cooley's *Constitutional Limitations*.¹²² Vallarta often consulted and quoted Kent's *Commentaries on American Law* to state principles of U.S. constitutional law.¹²³ Vallarta also resorted to less familiar works of the period including those of Sedgwick,¹²⁴ Paschal,¹²⁵ and Bump.¹²⁶

116. 1 *id.* at 59-60, 71.

117. 2 VALLARTA, VOTOS, *supra* note 1, at 14 (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819)).

118. *Id.* at 58-60; (citing *Brown v. Maryland*, 25 U.S. 419 (1827)).

119. *Id.* at 167, 180-84, 193 (citing *Jackson v. Steamboat "Magnolia,"* 61 U.S. 296 (1857)).

120. *See, e.g.*, 1 *id.* at 140; 2 *id.* at 28-30, 187, 197, 206; 3 *id.* at 397.

121. *See, e.g.*, 1 VALLARTA, VOTOS, *supra* note 1, at 199, 205; 2 *id.* at 7, 30-31, 75, 98, 185, 191; 3 *id.* at 13, 272-74, 402; 4 *id.* at 466 (citing STORY, *supra* note 69).

122. *See, e.g.*, 2 *id.* at 12-13, 15, 18, 21, 64, 99-100, 140, 147; 3 *id.* at 14, 16-17, 111, 119-22, 161, 211, 353; 4 *id.* at 212-14, 301, 303-04, 339, 341, 343-45, 409, 466, 538, 542 (citing THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATUTES OF THE AMERICAN UNION (1868)).

123. *See, e.g.*, 2 VALLARTA, VOTOS, *supra* note 1, at 111; 3 *id.* at 209, 272, 396-397, 402 (citing JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826-1830)).

124. *See, e.g., id.* at 16 (citing CHARLES SEDGWICK MAY, TRIAL BY JURY (1875)).

As one might expect considering Vallarta's goal, his use of United States materials extended far beyond United States constitutional law. More specific treatises also found place in Vallarta's opinions. For example, when Vallarta was faced with a case analyzing the nature of railroad concessions, Vallarta turned to Pierce's *American Railroad Law*,¹²⁷ Redfield's *The Law of Railways*,¹²⁸ and Kent's *Commentaries*.¹²⁹ For cases touching on taxation, Vallarta consulted passages from Burrough's *On the Law of Taxation*.¹³⁰ When habeas corpus was the issue, Vallarta used Hurd's treatise on the topic, in addition to his own comparative work.¹³¹ Yale's *Legal Title to Mining Claims*¹³² and Blanchard's *Law of Mines*¹³³ were consulted for mining questions. For extradition, Vallarta cited the English work Clarke's *Law of Extradition*,¹³⁴ Wheaton's *Elements of International Law*,¹³⁵ and Wharton's *Conflict of Laws*.¹³⁶

Thus, Vallarta's use of *Marbury* to construct the doctrine of judicial review in Mexico was consistent with his use of United States sources when addressing numerous problems of constitutional import as a judge. It was not, for Vallarta, unusual. By asserting the Mexican Supreme Court's competence to examine the appropriateness of Prieto's decision that the state statute violated the federal constitution, Vallarta's opinion asserted a far-reaching notion of judicial review. The inconsistency of legislation with the federal constitution was within the province of any judge because the law the judge was charged with ultimately applying was the federal constitution. Similarities in constitutional texts permitted Vallarta to

125. See, e.g., *id.* at 32, 206; 3 *id.* at 255, 402 (citing PASCHAL, *supra* note 70).

126. See, e.g., 3 *id.* at 444.

127. EDWARD LILLIE PIERCE, A TREATISE ON AMERICAN RAILROAD LAW (1857).

128. ISAAC F. REDFIELD, THE LAW OF CARRIERS OF GOODS AND PASSENGERS (1869).

129. See, e.g., 1 VALLARTA, VOTOS, *supra* note 1, at 178-79 (citing KENT, *supra* note 123).

130. See, e.g., 2 *id.* at 15, 17, 64 (citing W.H. BURROUGHS, A TREATISE ON THE LAW OF TAXATION AS IMPOSED BY THE STATES AND THEIR MUNICIPALITIES (1877)).

131. See, e.g., *id.* at 100; 3 *id.* at 43, 450, 471-72, 474-76, 510, 520; 4 *id.* at 129 (citing ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY: AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES (1858)).

132. See, e.g., 2 *id.* at 112-13 (citing GREGORY YALE, LEGAL TITLES TO MINING CLAIMS AND WATER RIGHTS IN CALIFORNIA (1866)).

133. See, e.g., *id.* at 113-14, 121-22 (citing GEORGE A. BLANCHARD & EDWARD P. WEEKS, THE LAW OF MINES, MINERALS, AND MINING WATER RIGHTS (1877)).

134. See, e.g., 4 *id.* at 121 (citing EDWARD CLARKE, THE LAW OF EXTRADITION (1867)).

135. See, e.g., *id.* at 129-30 (citing HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (1836)).

136. See, e.g., *id.* at 130-31 (citing FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAW, OR, PRIVATE INTERNATIONAL LAW (1872)).

engage the essential United States case on judicial review and expand its application in Mexico to an extent not yet contemplated by the United States itself.

Vallarta did not only assert broad-ranging ideas of judicial review from the bench. His study of the *amparo* writ and habeas corpus published in 1881 also argues for the doctrine. It offered Vallarta an opportunity to step back from the adjudication of individual cases and to expound on the application of constitutional protections within constitutional systems. This comparative work covered the history, application, limits, and procedure of both habeas corpus and *amparo*. The work also advocated strongly for a particular view of constitutional decision-making in Mexico, one consistent with his work in the *Votos*. Comparing *amparo* to habeas corpus gave Vallarta an opportunity to explore various larger aspects of constitutional law and to revisit many of the principles he had set out in his *Votos*. For example, early in the book he advanced arguments for the power of judicial review for the Mexican Supreme Court.¹³⁷ In another portion of the work he examined the nature and limits of the doctrine of judicial review within Mexican law.¹³⁸

Linked to Vallarta's view of judicial review was the use of judicial opinions as sources for binding rules of constitutional interpretation.¹³⁹ A provision of the Mexican Constitution, known as the Otero Formula, provided quite an obstacle. The Otero Formula stated: "A judgment will always be such that it only addresses the particular individuals, limiting itself to protecting them and defending them in the particular case upon which the action is brought, *without making any general declaration regarding the law or act that motivated it.*"¹⁴⁰ Vallarta carefully wove his arguments for case-based constitutional jurisprudence in the style of the United States despite this seemingly clear Mexican constitutional injunction to the contrary.¹⁴¹ To this provision limiting the *amparo* law, he responded:

To determine the effects of a judgment of *amparo* is the topic I wish

137. VALLARTA, JUICIO, *supra* note 79, at 11-21.

138. *Id.* at 269-73 ("Bien está que la Corte juzgue de las leyes secundarias para decidir si ellas son o no conformes con la fundamental: su deber es anularlas, cuando en algo la contradigan, y cumpliendo con ese deber, llena su elevada misión de interpretar final y decisivamente esa ley suprema . . .").

139. VALLARTA, JUICIO, *supra* note 79, at 272-73, 296-322.

140. Constitución Política de la República Mexicana [Const.], art. 102, Diario Oficial de la Federación [D.O.], 17 de Febrero de 1857 (Mex.) (emphasis added).

141. VALLARTA, JUICIO, *supra* note 79, at 299-300, 310.

to now address. The theories of our constitutional jurisprudence on this point are of the greatest importance, treating judgments that not only protect the individual against abuses of power, but also determine the public law of the nation, establishing the final interpretation of the supreme code.¹⁴²

As an essential element in his constitutional scheme, Vallarta had to push the application of the *amparo* judgments beyond judicial relief for the claimant. He wrote in the treatise:

And do not think that judgments of *amparo* by being trapped in the narrow limit of protecting an individual only in the particular are of little importance: they are, on the contrary, of the highest value, so high, that according to law, they ought to be published in the newspapers to determine the public law of the nation; they serve to nullify unconstitutional laws, to conserve the balance between the federal and local authority, avoiding their mutual collisions; they form the supreme, definitive and final interpretation of the Constitution, even above the interpretation that the legislator wanted to establish; through a peaceful process they resolve the most serious, the most difficult questions upon which the peace of the nation rests at times, the sovereignty of the states, the imperium of law over authority, the precepts of justice over the exigencies of political passion. Judgments of this transcendence cannot be but of the highest importance, much greater than the importance of judgments in ordinary trials.¹⁴³

If judges stuck to “studied brevity” and “routine formulas” in deciding cases then, according to Vallarta, this second aspect of *amparo* judgments is carried out poorly.¹⁴⁴ Judges who did so abandoned their duty and were blind to the important ends of such decisions.¹⁴⁵

To establish this method of constitutional analysis, Vallarta understood that he had to address the criticism that his method violated the constitutional prohibition of Article 102, the Otero Formula. Vallarta’s first point was to note that there was a difference between a judgment and the reasons of a judgment. A judge who resorted to brevity and forms misunderstood the meaning of the constitutional provision, confusing these two aspects of the judge’s activity. He then noted that an even narrower reading of the constitutional provision justified his method. He quoted

142. *Id.* at 294.

143. *Id.* at 316-19.

144. *Id.* at 320.

145. *Id.*

Lozano's *Derechos del hombre* for the proposition that

What the constitution prohibits . . . is that in the part of the judgment setting out the resolution, it is declared that the law or act that is judged is unconstitutional; the judgment must limit itself to declaring that the justice of the Union protects and defends the claimant against the law or act complained of.¹⁴⁶

Thus, when explaining the reasons for its judgment, the court ought to keep two aspects of the case in mind: the protection of the claimant and the definitive interpretation of a constitutional text.¹⁴⁷ Indeed, Vallarta lamented the limitations placed on the effect of *amparo* judgments, that they can only protect the individual claimant and that similar claimants must also file a similar action. If only Mexico were to take a turn towards the practice of the United States where "one opinion of Marshall is worth as much as a law . . ."¹⁴⁸

Despite his best efforts in cases like the Prieto *Amparo* and in his writings, Vallarta was unsuccessful in establishing the broad power of judicial review he hoped to borrow from the United States. Nonetheless, his work established the framework of constitutional thinking in Mexico for years to come.

C. The Politics of Judicial Review

Vallarta's view of judicial review was part of a much larger political debate during the Porfiriato and the period leading up to the Mexican Revolution in 1910. Indeed, the function, power, and scope of action of the supreme court had been at issue since Mexican independence. Questions of the political independence of the court, of its power and jurisdiction especially in the important *amparo* action, and the specific or *erga omnes* application of its decisions were all debated. And they were all debated against an extremely varied political backdrop. Between 1833 and 1855, the presidency of Mexico changed over thirty-five times, with Antonio López de Santa Anna holding the position eleven different times.¹⁴⁹ There was a war with the United States, ended by the Treaty of Guadalupe Hidalgo in 1848.¹⁵⁰ The 1850s in Mexico witnessed liberal victories that

146. *Id.*

147. *Id.*

148. *Id.* at 322.

149. MICHAEL C. MEYER ET AL., *THE COURSE OF MEXICAN HISTORY* 312, 314 (6th ed. 1999).

150. *Id.* at 338.

eventually produced the Mexican Constitution of 1857.¹⁵¹ The victory would not produce a lasting compromise, and Mexico entered into the War of the Reform from 1858 to 1861, followed by the French Intervention until 1867.¹⁵² The period from 1876 to 1911, when Mexico was under the direct or indirect control of Porfirio Díaz, is commonly referred to as the Porfiriato. It was a period of technological and economic expansion when Mexico was open to foreign investment and ideas.¹⁵³ It was also a period that benefited too few and led directly to revolution.¹⁵⁴

As Linda Arnold has demonstrated, views of what the court should be varied according to the various political dictates of the day. For example, in 1847, the supreme court was granted a limited jurisdiction to review the constitutionality of statutes and, in fact, had eight such cases submitted to it.¹⁵⁵ By 1855, the court was firmly within the control of the executive with little power to serve as an independent sector of the government.¹⁵⁶ By the 1870s, different camps of constitutional thinkers debated the meaning and implementation of the egalitarian provisions of the liberal Constitution of 1857 including “the rights of man, universal male suffrage, a single chamber legislature, parliamentary government, a weakened executive, and popular election of judges.”¹⁵⁷ In 1893, Justo Sierra sought to insulate judges from executive control by reforming the constitution to making them irremovable.¹⁵⁸ Mention of these moments in the history of the court in politics is made merely to show how the perception of the court shifted with greater political shifts. The political landscape of Mexico was under almost constant change leading up to the period of Porfirio Díaz, and the view of the court shifted with political changes. There is something artificial in separating the notion of judicial review from the other related issues of the law surrounding *amparo*, *jurisprudencia*, the tenure of judges, and the place of the constitution and supreme court in the overall political landscape. Nonetheless, judicial review was a central, debated, and important aspect of this broader political debate. Vallarta, as might be expected in advancing a broad notion of judicial review, also saw the

151. *Id.* at 362-66.

152. *Id.* at 367, 371-86.

153. *Id.* at 417-38.

154. *Id.* at 467.

155. LINDA ARNOLD, *POLITICA Y JUSTICIA: LA CORTE SUPREMA MEXICANA, 1824-1855*, at 197-98 (1996).

156. *Id.* at 203.

157. Charles A. Hale, *The Civil Law Tradition and Constitutionalism in Twentieth-Century Mexico: The Legacy of Emilio Rabasa*, 18 LAW & HIST. REV. 257, 260 (2000).

158. *Id.*

court's function as legal, rather than political, and judicial rather than politically active.¹⁵⁹

With Ignacio Vallarta, a supreme court judge from the Díaz regime, as its major proponent, and with a United States Supreme Court case as its main justification, judicial review in Mexico was a fragile creation. At least in its self-identified *Marbury* manifestation, judicial review surely could not survive the Mexican Revolution of 1910 and the constitutional compromises of the Carranza government in the Mexican Constitution of 1917.

Not so. The Mexican Revolution would not kill assertions of the supreme court's power of judicial review nor would it stop influential appeals to the interpretational value of United States law. In fact, and as persuasively argued by Charles Hale, *Marbury* in Mexico was killed not by the Revolution but by *Lochner v. New York* and its progeny.¹⁶⁰

II. Mexican Judicial Review After Vallarta

Emilio Rabasa was a central figure in the revolutionary and post-revolutionary trajectory of constitutional thought in Mexico. Hale has uncovered both Rabasa's place in advancing United States notions of constitutional interpretation in Mexico and the ultimate demise of this approach after the 1920s when another scholar, Felipe Tena Ramírez, rejected the United States approach to judicial review espoused by Rabasa,¹⁶¹ in part because of *Lochner*-era decisions.¹⁶² This article has, so far, revealed the important role *Marbury* played in constructing Mexican ideas of judicial review in the 1880s, but this contribution is more significant when the works and thought of Vallarta are recognized as fundamental aspects of Rabasa's constitutional thought. Thus, Hale's work on Rabasa is of even greater moment when the intellectual tradition of Mexican judicial review and its use of United States sources, especially *Marbury*, is tied to Vallarta.

Rabasa kept a comparative approach to Mexican constitutional law, one that relied heavily on United States sources and thought, alive through the revolutionary years. He supported and benefited from the regime of Porfirio Díaz which lasted from about 1877 to 1911.¹⁶³ Nonetheless, as

159. LUCIO CABRERA ACEVEDO, *LA SUPREMA CORTE DE JUSTICIA EN EL PRIMER PERIODO DEL PORFIRISMO (1877-1880)* 135 (1990).

160. Hale, *supra* note 157, at 276; *Lochner v. New York*, 198 U.S. 45 (1905).

161. Hale, *supra* note 157, at 275.

162. *Id.*

163. *Id.* at 265.

early as 1912, Rabasa wrote that a constitutional stage must follow a dictatorial stage and that a strong supreme court with a permanent membership was part of this new phase.¹⁶⁴ Protesting the revolutionary meddling of Francisco Madero in the workings of the Escuela Nacional de Jurisprudencia, Rabasa founded the Escuela Libre de Derecho, a law faculty that was to gain national prominence over the next twenty years despite its early association with antirevolutionary adherents of Victoriano Huerta.¹⁶⁵ From 1913 to 1920, Rabasa was exiled in the United States, but his writings on constitutional law nonetheless had a profound effect on the drafting of the Constitution of 1917. In 1919, while still living in the United States, he published a substantial treatise on judicial review, *El Juicio Constitucional*, that fully reflected his exposure to United States constitutional law. This exposure shaped his views both on law generally and on judicial review more specifically.¹⁶⁶

A. Rabasa's *El Juicio Constitucional*

Rabasa's text kept the influence of United States constitutionalism alive in Mexico because much of his analysis responded either to the persuasiveness of United States legal materials and structures in general, or, particularly in the second half of the work, to the writings of Vallarta. There is hardly a page in the over three-hundred-page work that does not mention the English common law tradition or the United States. Indeed, Rabasa's chapters include: "Judicial Supremacy in the United States," "The development of Marshall's Doctrine," "Consequences of the Work of Marshall," and "Theory of Judicial Supremacy."¹⁶⁷ For the most part, Rabasa is critical of Vallarta, but by engaging Vallarta on his terms, Rabasa remains within the same tradition of Mexican constitutionalism, one highly responsive to United States models and sources.¹⁶⁸

164. *Id.*

165. *Id.*

166. *Id.* at 265-266.

167. RABASA, *EL JUICIO CONSTITUCIONAL: ORIGENES, TEORÍA Y EXTENSIÓN* 347 (1919).

168. See, e.g., *id.* at 187-93 (criticizing Vallarta's attempts to broaden the scope of amparo actions); *id.* at 204-05 (attacking Vallarta's understanding of *habeas corpus*); *id.* at 208 n.1 (taking issue with several of Vallarta's conclusions). Baker notes that Rabasa was highly critical of Vallarta's attempt to protect unenumerated individual constitutional rights, which Vallarta called rights derived from the "concordance of articles." This attempt to expand the amparo jurisdiction was effectively put to rest by Rabasa. BAKER, *supra* note 23, at 114-19. Nevertheless, Rabasa asserted other methods to expand the application of amparo. *Id.* at 119; see also H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 33 (2004) ("[I]t has been said that even violent debate contains within it the possibility of toleration, since by implication the other is worth arguing with. To direct one's thoughts against

In adopting this overall approach, he made reference to both *Marbury* and Vallarta's use of the case in the Prieto *Amparo*.¹⁶⁹ In one portion of his text, Rabasa addressed the way Marshall developed the doctrine of judicial review, quoted several paragraphs of *Marbury* and concluded, "Such is, in brief extract, the famous and classic opinion that established the supremacy of the Constitution and condemned to nullity any federal and state laws that afterwards ran aground of a constitutional precept."¹⁷⁰ At another point Rabasa refers to *Marbury*, stating, "United States theory and case law were . . . unmoved since the opinion of Marshall in the classic case *Marbury v. Madison*: a law that infringes the Constitution is null, it is no law, it produces no legal effect, it never existed."¹⁷¹

Rabasa, however, did not follow Vallarta in the application of *Marbury* to Mexican constitutional jurisprudence. Addressing the Prieto *Amparo*, Rabasa found fault with Vallarta's conclusions that judicial review in Mexico led to judicial determinations of unconstitutionality with *erga omnes* effect.¹⁷² Explicit in Rabasa's limitation of judicial review was a critique of *jurisprudencia* itself: "To combat the general doctrine of Vallarta, we refer to the principle that establishes it and not to the cases of application which expound it."¹⁷³ In Rabasa's view, findings of unconstitutionality were limited to the particular case, and had no broader application.

This interpretation was based on his reading of the *amparo* provision, Article 102 of the Constitution of 1857, which included the Otero Formula:

All cases addressed in the preceding article shall be brought by petition of the aggrieved party by means of procedures and methods of the judicial order as set forth in a law. The judgment shall always be such that concerns only the particular individuals, limiting itself to protect and guard them upon which the proceeding is brought, without making any general declaration respecting the law or act that motivated it.¹⁷⁴

Rabasa rejected Vallarta's clever reading of the provision and strictly read the provision within the civilian tradition. He chastised judges who go

someone is to remain within their orbit.").

169. See *infra* notes 170-175 and accompanying text.

170. RABASA, JUICIO, *supra* note 167, at 116.

171. *Id.* at 235-36.

172. *Id.* at 260-61.

173. *Id.* at 262.

174. *Id.* at 263-64.

beyond their limited role:

It is not permitted to an interpreter of a statute, neither as commentator nor much less as judge, to change a provision, because this is to falsify it; and to leave words in it as waste is the same as changing it; how much more grave is the fault when the words are of great importance and significance. It is an elemental rule of the interpreter that each word of a law must have value¹⁷⁵

In essence, Rabasa read the constitutional provision as any other statute, as a good civil law trained judge should. Implicit in his analysis of the provision is that constitutional language should be subject to the same interpretational methods and judicial strictures imposed by the civil law when interpreting statutes.

A second, yet no less important, aspect of Rabasa's critique of Vallarta's sweeping judicial review is Rabasa's concern that judicial review may hold back socially progressive legislation when conservative judges find the legislation unconstitutional. Rabasa asserted that legislative supremacy led to a system responsive to the industrial movements of the age.¹⁷⁶ These concerns are labeled *Lochnerism* by historians of the United States Supreme Court.¹⁷⁷ Citing C. G. Haines,¹⁷⁸ Rabasa expressed concern that the United States Supreme Court had held unconstitutional over one hundred fifty pieces of legislation touching on salaries, hours and condition of work, the employment of women and children, the protection of employees, and unions.¹⁷⁹ This was a threat to economic and social progress in Mexico:

But in the present, the working class, so numerous and so effected by the legislation that concerns it, compares the easy liberty of the Legislative and its flexibility to accommodate itself to the progress of ideas, with the obstructive immobility of the legal criteria that raise a barrier to the necessary evolution in the tribunals. Industrialism has transformed the economic theories, while precedent has petrified the law; and the constitution has acquired the

175. *Id.* at 264.

176. *Id.* at 308.

177. David Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 60 (2003); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 (2005); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 171 (2002).

178. CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (1914).

179. RABASA, JUICIO, *supra* note 167, at 309.

rigid fragility of cast iron.¹⁸⁰

The fear that *erga omnes* constitutional decisions might impede the social revolution was too great to grant this power to the supreme court. Indeed, as an illustration, in another part of Rabasa's text, he looked to the case of *Wilson v. New*.¹⁸¹ In *Wilson*, the United States Supreme Court reversed a district court's decision to enjoin enforcement of a federal statute fixing the working day at eight hours and temporarily setting wages for employees on interstate railways.¹⁸² Although the Court upheld the legislation beneficial to the railway workers, Rabasa found a grave concern where the modern United States reader finds rather neutral procedural and unexceptional constitutional positions. Rabasa's treatise quoted the following passage from Chief Justice White's majority decision:

The law was made to take effect only on the 1st of January, 1917. To expedite the final decision before that date, the representatives of the labor unions were dropped out, agreements essential to hasten were made, and it was stipulated that, pending the final disposition of the cause, the carriers would keep accounts of the wages which would have been earned if the statute was enforced so as to enable their payment if the law was finally upheld. Stating its desire to co-operate with the parties in their purpose to expedite the cause, the court below, briefly announcing that it was of opinion that Congress had no constitutional power to enact the state, enjoined its enforcement, and, as a result, of the direct appeal which followed, we come, after elaborate oral and printed arguments, to dispose of the controversy.¹⁸³

In his text, Rabasa italicized "labor unions" and "stating its desire to co-operate with the parties."¹⁸⁴ It was not the result of the decision, but the mere fact that the legislation had to pass through the judicial gauntlet that Rabasa found unacceptable. He commented, "The decision of the Court was by five votes against four in favor of the constitutionality of the law. If the decision had been the other way, the law would have died at birth without producing any material effect."¹⁸⁵ Rabasa concluded that this would be untenable for Mexico: "[I]n the United States an innovative law

180. *Id.* at 309-10.

181. *Wilson v. New*, 243 U.S. 332 (1917).

182. *Id.* at 359.

183. *Id.* at 342-43.

184. RABASA, JUICIO, *supra* note 167, at 252-53.

185. *Id.* at 253.

does not stand firm, it almost does not stand as law, while it has not been submitted to the test of the federal judiciary."¹⁸⁶ The promises of Mexican social progress could not be held up by the petrified precedents of the supreme court. Representatives of labor unions should not be excluded in the process. Courts should not be so powerful that their desire to cooperate with the parties could make or break the validity and effectiveness of important legislation. Vallarta's call for binding supreme court decisions and power to review legislation with *erga omnes* effect was inconsistent with the plain language of the Mexican Constitution, with the proper role of judges (even supreme court judges) in the Mexican system, and with the social and political trajectory of post-revolutionary Mexico.

Nonetheless, by his carefully articulated responses to Justices Marshall and White, Rabasa remained within the orbit of Vallarta's paradigm and the persuasive authority of United States constitutional cases on Mexican constitutional development. Rabasa might reject specific aspects of the analysis, but the overall approach, analysis, and arguments indicated that Vallarta's, and thus the United States', grasp on Mexican constitutional law survived what it should not have, the Mexican Revolution, and indeed the Mexican Constitution of 1917.

B. Developments After Rabasa's *El Juicio Constitucional*

Mexican judicial review was conducted by judges under the *amparo* provision of the Mexican Constitution of 1857 and subsequent legislation such as the *Amparo* Acts of 1882, authored by Vallarta, and that of the early twentieth century. By the time of the Revolution in 1910 and the drafting of the Constitution of 1917, the *amparo* action was a mainstay of Mexican legal mentality. *Amparo* provisions were inserted into the Constitution of 1917 with little discussion, and thus the regime of judicial review under *amparo* actions continued seamlessly into the new era.¹⁸⁷ The history of the *amparo* in the twentieth century has been well documented by Baker who traces the action's response to various political and societal pressures in the century.¹⁸⁸ Although its use, scope, procedures, and smooth administration changed from decade to decade and at each new *Amparo* Act, the action itself has continued as a core part of Mexican law.¹⁸⁹

Rabasa's influence on Mexican constitutional law did not end with the

186. *Id.* at 251.

187. BAKER, *supra* note 23, at 42, 46.

188. *Id.*

189. *Id.* at xii-xiii.

publication of *El Juicio Constitucional*. He continued to respond to various challenges. One structural problem that plagued the Mexican Supreme Court was the widespread availability of the *amparo* action. The actions clogged the docket of the court and the court had no power to pick and choose which cases it would hear based on their constitutional importance. In 1921, Rabasa suggested creating a French-style court of cassation to hear appeals from the ordinary jurisdiction that contained little or no constitutional difficulties.¹⁹⁰ This would have removed many *amparo* actions from the supreme court because, at the time, an incorrect decision by a lower court was interpreted to be a denial of a constitutional right, thus leading to the general use of *amparo* to review lower court decisions. The supreme court would then be able to focus its efforts on major constitutional concerns. The proposal was not well received and no action was taken to move it forward.¹⁹¹

Rabasa, however, left an important school of thought, both literally and figuratively. His *Escuela Libre de Derecho* became an important center of Mexican legal education, and its counterrevolutionary flavor did not impact its ability to be an important actor during the formative years of the revolution. Indeed, the author of the draft constitution presented in 1916 under President Caranza, José Natividad Macías, was both a Rabasa disciple and founding faculty member of his *Escuela*.¹⁹² In 1929, the *Escuela* had produced a president, Portes Gil, and a minister of education, Ezequiel Padilla. Its position in the legal firmament of Mexico was established.¹⁹³

Rabasa's views of Mexican constitutionalism were continued by his son, Oscar, who earned a law degree from the University of Pennsylvania in 1917 when his family was in exile in the United States.¹⁹⁴ With respect to interpretive questions concerning the Mexican constitution, the son echoed his father and Ignacio Vallarta with assertions that, because *amparo* actions are adapted from United States judicial review, Mexican judges should read and apply United States Supreme Court decisions. He bemoaned the lack of sources on United States law available in Mexico, the lack of comparative legal studies that would enlighten Mexican constitutional work, and the poor state of Mexican understanding of United

190. Hale, *supra* note 157, at 270.

191. *Id.* at 271.

192. *Id.* at 272.

193. *Id.* The school continues to this day. *Escuela Libre de Derecho* Home Page, <http://www.eld.edu.mx/>.

194. Hale, *supra* note 157, at 273.

States law.¹⁹⁵ Attempting to bridge this gap in Mexican legal understanding in 1944, Oscar Rabasa published an important treatise on United States law, *El Derecho angloamericano*.¹⁹⁶

In addition to Rabasa's son, Manuel Herrera y Lasso, an important constitutional law professor at the *Escuela Libre* and founder of the *Partido de Acción Nacional*, also carried the Rabasian mantle. Herrera y Lasso backed Rabasa's proposal for a court of cassation, advanced arguments for the life tenure of judges, and unsuccessfully argued that a statue of Rabasa be erected in the supreme court to join those already recognized as creators of the Mexican *amparo* action: Manuel Crecencio Rejon, Mariano Otero, and Ignacio Vallarta.¹⁹⁷ Although collections of his essays were published, they failed to keep Rabasa's vision of Mexican constitutionalism alive.¹⁹⁸

The seeds of destruction of Vallarta and Rabasa's view of Mexican constitutionalism, if they can be considered a similar view, are found even in the writings of Rabasa himself. Hale notes that towards the end of *El Juicio Constitucional*, Rabasa wondered, somewhat oddly perhaps for an antirevolutionary social conservative, whether the U.S. judiciary could adapt to social change; for example, it had overturned labor legislation regulating wages, hours and organizations. Is the United States Supreme Court, he asked, incompatible with the evolution of ideas, inflexible and old-fashioned, as charged by labor groups?¹⁹⁹

Felipe Tena Ramírez, a former student of Rabasa's at the *Escuela Libre*, who later became a President of the supreme court and a noted constitutional scholar, picked up this critique. These concerns led Tena Ramírez to move Mexican constitutional law away from United States methods, sources, and notions of subjecting legislation to constitutional scrutiny through *amparo*. The development of the social state could be substantially hindered by a supreme court that had been infected by the "contagion of politics."²⁰⁰ Indeed, Tena Ramírez defended the right to revolution and, according to Hale, his "construction of the right to

195. *Id.*

196. *Id.* The work is OSCAR RABASA, *EL DERECHO ANGLOAMERICANO. ESTUDIO EXPOSITIVO Y COMPARADO DEL "COMMON LAW"* (1944).

197. Hale, *supra* note 157, at 275.

198. *Id.* at 272, 274. These collections are MANUEL HERRERA Y LASSO, *ESTUDIOS CONSTITUCIONALES* (1940); MANUEL HERRERA Y LASSO, *ESTUDIOS CONSTITUCIONALES, SEGUNDO SERIES* (1964); and MANUEL HERRERA Y LASSO, *ESTUDIOS POLITICOS Y CONSTITUCIONALES* (1986). In 2002, the Escuela Libre published additional articles, lectures, speeches, and letters in MANUEL HERRERA Y LASSO, *CASA CONSTRUIDA SOBRE ROCA* (2002).

199. Hale, *supra* note 157, at 268.

200. *Id.* at 276.

revolution seemed to run parallel to his critique, in the manner of Rabasa, of the United States Supreme Court's attack on social legislation early in the century, which he termed a defense of the capitalist social order (a phrase, of course, which Rabasa would never have used)."²⁰¹ It was the legacy of the political content of the *Lochner* era decisions, along with the fear that socially or economically advantageous legislation might be held to be unconstitutional by a conservative court, that led Tena Ramírez to reject the powerful use of judicial review of legislation through *amparo*, an action he reconceptualized to protect only individual constitutional rights.²⁰²

It was not the revolution that forced Mexican constitutionalists to look away from the historically and substantively related constitutional jurisprudence of the United States; it was rather the fear that an overly conservative judiciary might stifle socially useful legislation essential to the Mexican political project of the first half of the twentieth century. Once the conceptual break had been made, the separation was lasting and the domestic about-face of the United States Supreme Court action in response to the New Deal remained detached from Mexican constitutional jurisprudence.²⁰³

Although Vallarta did not win the day for *Marbury*-style judicial review, his analysis and method defined Mexican constitutional discourse for the next sixty years. The Mexican revolution did not directly wipe out his approach based on United States sources and thinking. Constitutional theorists had to respond to his analysis and proposals well into the twentieth century; his views defined the debate.

Thus, to the present day, a single case in an *amparo* action has no precedential value and no *stare decisis* effect. The Otero Formula, restricting the application of the judgment of an *amparo* case to the individual parties, continues to rule. It provides that the judgment in an *amparo* case is limited to providing the aggrieved party with the protection of federal justice in the particular case, *without making any general declaration with respect to the law or act that produced the amparo judgment*. The judgment applies only to the party, the particular aggrieved individual, and to no one else. The next aggrieved individual, even under identical circumstances, must also file an *amparo* action. As a result, for some events or recurring situations, it is not unusual to have thousands of

201. *Id.*

202. *Id.* at 277.

203. Daniel A. Farber, *Who Killed Lochner?*, 90 GEO. L.J. 985 (2002) (reviewing G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000)).

individuals filing with a concomitant overburdening effect on judiciary.²⁰⁴ Nonetheless, approximately one hundred years after Vallarta argued forcefully for the wide application of constitutional determinations, President Zedillo, in 1995, led the campaign to amend Article 105 of the Mexican Constitution. Following several European models, the amendment provides that the supreme court may determine that certain decisions have general, or *erga omnes*, application.²⁰⁵ A century later, Mexico moved back toward Vallartian notions of judicial review.

III. Perspectives on Vallarta's Constitutionalism

Vallarta's approach to constitutional law resonates today. It provides a useful example of constitutional migration and may even be a corrective tale to a number of arguments surrounding the United States Supreme Court's recent encounters with comparative constitutionalism. This section seeks to move the discussion of these issues along using Vallarta and particularly his decision in the Prieto *Amparo* as material for various observations about comparative constitutionalism in practice. After a brief note on terminology, this section explores Vallarta's use of *Marbury* and makes a small but unexpected contribution to *Marbury* historiography: Vallarta saw judicial review in *Marbury* before the United States Supreme Court did, hence the precocious aspect of the doctrine's southern migration. This section then makes the extremely basic, but nonetheless important, point that comparative constitutionalism is not something new. This section then addresses the question of constitutional decision making from the civil law and common law standpoint, followed by a critique of Vallarta's use of foreign expertise as a possible means of making domestic use of his foreign capital.

A. Justifying the Use of Foreign Sources in Migration

For the past ten years, judges, legislators, law professors, and lawyers in the United States have been embroiled in substantial debate about the use, promise, misuse, corruptive influence, and danger of foreign sources in our constitutional decision making. Indeed, in the wake of *Lawrence v.*

204. 1 JORGE A. VARGAS ET AL., MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS 61 (Jorge A. Vargas ed., West Group 1998).

205. *Id.* at 62. This form of "single-ruling" *jurisprudencia* is very unusual in Mexico. "Only when the highest court in a judicial hierarchy (such as the Mexican Supreme Court, or a state's highest court) decides a matter in plenary session will the rule of *jurisprudencia obligatoria* require subsequent courts to follow the single court decision." ZAMORA ET AL., *supra* note 21, at 84.

Texas,²⁰⁶ *Roper v. Simmons*,²⁰⁷ and other recent Supreme Court cases, the place of international sources in United States constitutional jurisprudence has been heatedly debated in this country.²⁰⁸ A substantial scholarly literature has developed.²⁰⁹ Some of America's top constitutional scholars have given their attention and perceptive analysis to the practice.²¹⁰ Some have found the debate to be overblown because, in their view, the Court's use of foreign sources is inconsequential and rhetorical, rather than going to the substance of the case.²¹¹ With unwitting irony for this study, one scholar has recently suggested that the language in *Marbury* prohibits the practice of using foreign sources in U.S. constitutional analysis.²¹²

206. *Lawrence v. Texas*, 539 U.S. 558 (2003).

207. *Roeper v. Simmons*, 543 U.S. 551 (2005).

208. *Id.*; Comment, *The Debate over Foreign Law in Roper v. Simmons*, 119 HARV. L. REV. 103 (2005); Anne E. Kornblut, *Justice Ginsburg Backs Value of Foreign Law*, N.Y. TIMES, April 2, 2005, at A10.

209. See Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 11; Symposium, *Constitutional Borrowing*, 1 INT'L J. CONST. L. 177 (2003); Symposium, *Comparative Avenues in Constitutional Law*, 82 TEX. L. REV. 1653 (2004).

210. See Roger P. Alford, *Four Mistakes in the Debate on "Outsourcing Authority,"* 69 ALB. L. REV. 653, 658-64 (2006) [hereinafter Alford, *Four Mistakes*] (grouping academics into opponents and proponents of the practice and noting how judges, government officials, Congress, and political commentators have taken on the debate); Roger P. Alford, *In Search of a Theory of Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005) (analyzing use of foreign materials from the standpoint of classic constitutional theory); Steven G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006) (exploring the roots of American exceptionalism and its relationship to constitutional practice); Stephen G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097-118 (2004) (examining foreign sources in the law-making process, in determinations of reasonableness, in understanding the judicial role, and in matters of interpretation); David Fontana, *The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet*, 38 LOY. L.A. L. REV. 445 (2004); Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239 (2003); Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006) [hereinafter Tushnet, *When Is Knowing*] (categorizing and arguing against critiques of the practice).

211. Osmar J. Benvenuto, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 FORDHAM L. REV. 2695, 2742 (2006).

212. "[T]he use of foreign decisions undermines the limited theory of judicial review, as set out in *Marbury v. Madison*. Chief Justice Marshall justified the federal courts' power to ignore enacted laws that were inconsistent with the Constitution on the ground that such statutes fell outside the delegation of authority by the people to the government, as expressed in the Constitution. Relying on decisions that interpret a wholly different document runs counter to the notion that judicial review derives from the Court's duty to enforce the Constitution." John Yoo, *Peeking Abroad?: The Supreme Court's Use of Foreign Precedents in Constitutional Cases*, 26 U. HAW. L. REV. 385, 387 (2004); see also *id.* at 394-99.

Some of this literature naturally springs forth from the larger body of work on comparative law in a transnational context. Thus, Vallarta's work, his *Votos*, and his use of *Marbury* are examples of "legal transplants,"²¹³ of "legal borrowing,"²¹⁴ or of "constitutional migration."²¹⁵ Each term has its benefits and drawbacks.²¹⁶

Alan Watson's approach to borrowing would have us look at various factors including (1) non-legal historico-political relations between donor and host;²¹⁷ (2) the shared language and proximity between donor and host;²¹⁸ (3) the nationalistic concerns of the host;²¹⁹ (4) the lack of a strong native law in the host;²²⁰ (5) the possible misinterpretation of the donor law by the host;²²¹ and (6) the donor being more legally mature than the host.²²² It is a matrix of factors that describe well Vallarta's appropriation of United States constitutional law for Mexico in the 1880s. Some read Watson's foundational and extremely helpful work on legal transplants with the uncharitable eyes of postmodernism. Pierre Legrand views Watson's approach as "a most impoverished explanation of interactions across legal systems."²²³ Legrand would prefer a "hermeneutic explication of mediation of different forms of legal experience within a descriptive and critical metalanguage."²²⁴ Indeed, Watson's reissue of the classic responds to them.²²⁵

213. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

214. For the "borrowing" literature, see Symposium, *Constitutional Borrowing*, *supra* note 209. For examples in the private law context, see M.C. Mirow, *Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoléon in Drafting the Chilean Civil Code*, 61 LA. L. REV. 291 (2001) [hereinafter Mirow, *Borrowing*], and M.C. Mirow, *The Power of Codification in Latin America: Simón Bolívar and the Code Napoléon*, 8 TUL. J. INT'L & COMP. L. 83 (2000).

215. Hirschl, *supra* note 11.

216. Some scholars seem to use the terms interchangeably. Noga Morag-Levine writes of "transplants," "transplantation," "borrowing," and "importation." Noga Morag-Levine, *Judges, Legislators, and Europe's Law: Common-Law Constitutionalism and Foreign Precedent*, 65 MD. L. REV. 32, 32, 48 (2006).

217. WATSON, *supra* note 213, at 51.

218. *Id.* at 93.

219. *Id.* at 51.

220. *Id.*

221. *Id.* at 99.

222. *Id.* at 91.

223. Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997).

224. *Id.* at 123.

225. For more on Watson's critics and his defense, see Mirow, *Borrowing*, *supra* note 214, at 303.

By contrast, advocates of “migration,” like Kim Lane Sheppele, have argued the weakness of the “borrowing” metaphor:

First, ideas are not “borrowed” with the implicit promise that they will be returned. Then, constitutional constructions are not owned in the way that “borrowing” implies, with the use of the object temporarily given to a non-owner while the real owner retains certain superior rights. . . . [Here], I want to use the new metaphor of “migration” to call attention to a different problem with the borrowing metaphor. Borrowing implies that the transfer of things that are borrowed is accomplished through a voluntary bargain among rough equals, different only in their propertied relation to the thing in question.²²⁶

Although the term “migration” solves some problems implicit in “borrowing,” it creates other problems. The term leaves out the instrumentality of the transfer. Birds migrate on their own, constitutional ideas do not. Someone picks them up and transplants them for some reason; someone borrows them. Legal change is often effected by individuals, and to leave out the important role of the individual gives a skewed impression of what has gone on.²²⁷ Indeed, a reading of Watson’s *Legal Transplants* helps as a corrective to the idea of “migration.” Because the individual as agent of legal change is an essential part of broader notions of migration, transplant, borrowing, or importation, my focus here is on the instrumentality of Vallarta in this process.

Framing the development of this issue in the United States, Sujit Choudhry notes that a number of United States Supreme Court cases brought the issue to the forefront.²²⁸ Dissenting in *Printz v. United States*,²²⁹ Justice Breyer looked at the practice of the European Federation in asking states to administer programs in relation to the U.S. federal government’s attempt to seek the assistance of state officials.²³⁰ Justice Breyer similarly turned to foreign sources in discussing the death penalty in subsequent cases.²³¹ The use of foreign sources by the Supreme Court

226. Kim Lane Sheppele, *The Migration of Anti-constitutional Ideas: The Post 9/11 Globalization of Public Law and the International State of Emergency*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 11, at 347-48.

227. M.C. Mirow, *Individual Experience in Legal Change: Exploring a Neglected Factor in Nineteenth-Century Latin American Codification*, 11 *SW. J. L. & TRADE AM.* 301 (2005).

228. Sujit Choudhry, *Migration in Comparative Constitution Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 11, at 1-2.

229. *Printz v. United States*, 521 U.S. 898 (1997).

230. *Id.* at 976-78 (Breyer, J., dissenting).

231. See *Foster v. Florida*, 537 U.S. 990 (2002); *Knight v. Florida*, 528 U.S. 990, 995-98 (1999).

became particularly contentious in *Lawrence*, in which Justice Kennedy referred to European case law to overturn an earlier decision upholding the constitutionality of a state sodomy statute.²³² In *Lawrence*, Scalia dissented and asserted that foreign sources were not relevant to the Court's activities.²³³ *Roper*, which held that the imposition of the death penalty on juveniles was unconstitutional, also raised the issue of the importance of foreign sources.²³⁴ These cases led to a number of justices discussing the issue.²³⁵

In introducing the idea of "migration" in comparative constitutional discourse, Choudhry uses a conversation between Justices Breyer and Scalia about the issue.²³⁶ Choudhry found Justice Breyer's "pragmatic rationale" that foreign opinions were useful in exploring the issue insufficient to rebut Justice Scalia's concerns.²³⁷ He underscores what is at stake this way: "The very legitimacy of judicial institutions hinges on interpretive methodology. So courts *must* explain why comparative law should count. And if courts do not, judicial review is open to the charge of simply being politics by other means, cloaked in legal language, and subject to attenuated democratic control."²³⁸

Indeed, as Choudhry argues, the lack of proper justification led to congressional action to limit the use of foreign sources by the Supreme Court.²³⁹ For example, Representatives in the House have recently introduced a resolution that the "meaning of the Constitution of the United States should not be based on judgments, laws or pronouncements of foreign institutions unless such foreign judgments, laws or pronouncements inform an understanding of the original meaning of the Constitution of the United States."²⁴⁰ And this is not the only attempt at congressionally setting courts' use of foreign materials.²⁴¹

Thus, if comparative constitutional law is to matter and to have valid persuasive authority, interpretive methodology is important. Choudhry suggests the metaphor of "migration," rather than other terms connoting

232. *Lawrence v. Texas*, 539 U.S. 558, 572-73, 576 (2003).

233. *Id.* at 598.

234. *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005).

235. See, e.g., Kornblut, *supra* note 208.

236. Choudhry, *supra* note 228, at 1 (citing *A Conversation Between U.S. Supreme Court Justices*, 3 INT'L J. CONST. L. 519 (2005)).

237. *Id.* at 4, 10.

238. *Id.* at 5.

239. *Id.* at 11.

240. Kornblut, *supra* note 208.

241. Morag-Levine, *supra* note 216, at 38-46 (surveying legislation and legislative history).

similar ideas like “transplant” and “borrowing.”²⁴² Within the context of United States and Mexican legal relationship, the metaphor of migration is apt even though the migration occurred in the nineteenth century and from the north to the south. When constitutional ideas migrate, they change; “It is understood that the process of migrating changes that which migrates.”²⁴³ Indeed, the migration of judicial review in this example served somewhat as a time machine. Vallarta’s view of *Marbury* provided a glimpse of what the case would become in the United States.

Where Justice Breyer fell short of the mark in justifying the use of foreign sources by the United States Supreme Court, Vallarta was careful to set out the reasons for his recourse to United States decisions in Mexico. Vallarta carefully set out the textual similarities between the United States Constitution and the Mexican Constitution before relying on the United States Supreme Court’s interpretation of the particular provision.²⁴⁴ Vallarta, in the Prieto *Amparo* and in other similar opinions, was keenly aware that competing views of the supreme court and its power were at play. To establish the kind of supreme court Vallarta sought, he would have to completely convince his audience not only of the rightness of the constitutional outcome, but also of the comparative method that led him to it.

Vallarta, in this sense, is a sensitive comparatist. Vallarta recognizes well, in Levinson’s terms, that Mexico has “a completely different political tradition.”²⁴⁵ Nonetheless, for Vallarta it was a political tradition reflected in the text of the Mexican Constitution as well as a political tradition to which Vallarta encouraged his country to aspire. Thus, once the textual connection was established at the constitutional level, Vallarta urged judges to trace developments out of the United States respecting the same text. Indeed, in a move not yet seen by the United States Supreme Court, Vallarta not only urged the persuasive authority of foreign decisions, but also, in his use of the Federal Judiciary Act of 1789, suggested that legislation resulting from constitutional text may also be of use.²⁴⁶

The difference in goals between the modern United States Supreme Court Justices’ and Vallarta’s use of foreign sources certainly affected their distinct approaches. It appears that the United States Justices, in their

242. Choudhry, *supra* note 228, at 19-21.

243. *Id.* at 23.

244. See *supra* notes 50-55, 111-115 and accompanying text.

245. Tushnet, *When Is Knowing*, *supra* note 210, at 1289 (citing Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353, 363 (2004)).

246. See *supra* notes 84-87 and accompanying text.

recent decisions incorporating foreign sources, are attempting to join a larger global interpretive community engaged in the analysis of human rights.²⁴⁷ Vallarta was not seeking to have his court join a broader community of constitutional interpretation; his goal was clearly one of emulation and adoption.²⁴⁸ Vallarta's task of justification was, in fact, much easier than the task presented to today's justices in the United States. He needed only to show the importance of and connection to the United States and its constitutional jurisprudence to further his aims. He did not have to undertake the process of culling and selecting that Justices who turn to foreign authorities are required to do today.²⁴⁹ In many ways, today's Justices are subject to much more criticism because they are faced with a world of interpretative opportunities and with a world of possible mistakes.²⁵⁰ Vallarta had only one foreign model in mind and only one group of foreign sources he wished to adopt in Mexico. If his methodology was correct, the sources were evident. With the United States Supreme Court today, even if the methodology is correct, there are still the problems of what sources to consult or whether the Court should consult every country commenting on a particular topic and construct a *communis opinio* of nations.²⁵¹

B. Vallarta reads *Marbury*

How well did Vallarta read *Marbury*? Answering this question requires many of us to shed much of what we think we know about the decision. Here, I ask you to forget your first weeks of Constitutional Law class and all the articles you may have read about the case. The first task is to construct the *Marbury* of the late-nineteenth century into the *Marbury* that would have been available to Vallarta. William Nelson reminds us, "In deciding *Marbury v. Madison*, Chief Justice Marshall and his colleagues thus were doing something other than adopting judicial review as we know it at the beginning of the twenty-first century."²⁵² For

247. Diarmuid F. O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 NOTRE DAME L. REV. 1893, 1897-99 (2004); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

248. See *supra* notes 96-136 and accompanying text.

249. Morag-Levine, *supra* note 216, at 42.

250. Alford, *Four Mistakes*, *supra* note 210, at 679 (criticizing Justice Breyer for selecting authority from Zimbabwe).

251. GLENN, *supra* note 168, at 174 n.24.

252. NELSON, *supra* note 18, at 5. In addition to Nelson's study, for the changing meaning of *Marbury* in United States constitutional history see CLINTON, *supra* note 8, and Stephen M. Griffin, *The Age of Marbury: Judicial Review in a Democracy of Rights*, in *ARGUING MARBURY V. MADISON* 104-46 (Mark Tushnet ed., 2005).

Marshall, judicial review was not about “protecting minority rights against majoritarian infringement.”²⁵³ But, by the later part of the nineteenth century in the United States, judicial review took on the task of protecting minorities from majorities “to protect the people against themselves.”²⁵⁴

What, then, did *Marbury* mean in the United States on the eve of Vallarta’s opinion in the Prieto *Amparo* in 1881? In his historical study of *Marbury* and its uses in the United States, Robert Clinton states that from the period of 1803 to 1865:

Marbury’s importance as a precedent for judicial review of legislation was never mentioned by the Court, not even in the only other case of the period in which the Court invalidated an act of Congress. This pattern continued during the period from 1865 through 1894, the year before the fateful *Pollack* and *Knight* decisions. During these years, the Court invalidated national laws in no fewer than twenty cases, yet *Marbury* is mentioned in none of them.²⁵⁵

It was not until 1894 that the United States Supreme Court began its practice of citing *Marbury* for the general power to invalidate statutes. Again, Clinton writes:

Finally, in 1894, the Supreme Court for the first time cited *Marbury* in support of an actual exercise of its power to invalidate acts of Congress in *Pollack*, the famous Income Tax Case. There the Court declares that *Marbury* confirms the idea that “it is within the judicial competency, by express provisions of the Constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the Constitution and to hold it valid or void accordingly.”²⁵⁶

It was not until the mid-twentieth century that the Court routinely cited the case to support the idea of judicial review generally.²⁵⁷ As Davison Douglas notes, “*Marbury* has become great because, over the years, proponents of an expansive doctrine of judicial review have needed it to assume greatness.”²⁵⁸

253. NELSON, *supra* note 18, at 85.

254. *Id.* at 91-93.

255. CLINTON, *supra* note 8, at 119; *see also id.* at 162.

256. *Id.* at 121.

257. *Id.* at 123.

258. Douglas, *supra* note 19, at 413.

The “judicial myth” of *Marbury*, the myth that permitted its citation as general authority for judicial review, was constructed by United States treatise writers in the latter half of the nineteenth century.²⁵⁹ Legal treatises, “doctrinal sources” in the civil law tradition, are key to Vallarta’s precocious use of *Marbury* in his attempt to establish judicial review in Mexico.²⁶⁰ Vallarta saw something in the case that even the contemporary United States Supreme Court did not. And what he saw was greatly influenced by his use of United States treatises. Cooley’s treatise *Constitutional Limitations*, published in 1868, views *Marbury* as a seminal work in constructing judicial review.²⁶¹ We know that Vallarta was familiar with Cooley’s work, which Clinton rightly credits with helping to establish the judicial review myth of *Marbury*.²⁶² Vallarta’s *Votos* cite Cooley’s *Constitutional Limitations* over twenty-five times.²⁶³

Two other early nineteenth-century treatises link *Marbury* with expansive notions of judicial review: Kent’s *Commentaries* published in 1826 and Joseph Story’s *Commentaries on the Constitution of the United States* published in 1833.²⁶⁴ Both treatises were known to Vallarta. Vallarta cited Story’s work over a dozen times in the *Votos*.²⁶⁵ Vallarta quoted from Kent’s *Commentaries* immediately before turning to *The Federalist No. 78* and *Marbury* in the *Prieto Amparo*.²⁶⁶ It is perhaps telling that when compared to his use of Cooley’s *Constitutional Limitations*, Vallarta’s use of Kent was much less frequent.²⁶⁷ In other words, it is likely that Vallarta sought these particular passages from Kent with great care. Despite my arguments below that Vallarta very much adopted a common law mentality for constitutional adjudication, Vallarta had been well schooled in the civil law.²⁶⁸ As a trained civilian lawyer,

259. CLINTON, *supra* note 8, at 163; see also Barry Friedman, *The Myths of Marbury*, in ARGUING *MARBURY V. MADISON*, *supra* note 252, at 64-87.

260. His reasoning may have been even more precocious when one considers that much of his argument in the *Prieto Amparo* was borrowed from another opinion he drafted in 1870.

261. CLINTON, *supra* note 8, at 163.

262. *Id.*

263. See *supra* note 122.

264. Douglas, *supra* note 19, at 382, n.34.

265. See *supra* note 121.

266. See *supra* note 123. Considering the importance of Kent’s text as an early statement of judicial supremacy, it is odd that historians of judicial review seem not to have incorporated its statements into the construction of the “myth” of *Marbury*.

267. See *supra* notes 122, 123.

268. For Vallarta’s formation as a student within the civilian tradition, see María del Refugio González, *El derecho en la época de Ignacio L. Vallarta*, in A CIEN AÑOS DE LA MUERTE DE VALLARTA 55, 68-59 (Miguel López Ruiz, ed., 1994). For Vallarta’s education, see Gabriel

Vallarta would be immediately drawn to the doctrinal treatment of the subject by Kent and Cooley as important sources in constructing his arguments.²⁶⁹

Through his reliance on these treatises on United States constitutional law, these doctrinal sources, *The Federalist No. 78*, and the text of *Marbury*, Ignacio Luis Vallarta and the Mexican Supreme Court in 1881 were able to construct a broad theory of judicial review before the United States Supreme Court rallied *Marbury* for the same principle in *Pollack* in 1895.²⁷⁰ The Mexican Supreme Court was the first court to raise *Marbury* to greatness because Vallarta, in Douglas's words, "needed it to assume greatness."²⁷¹ Vallarta could do so because he needed an expansive doctrine of judicial review for his court and because his collection of treatises on U.S. constitutional law already said that *Marbury* stood for this idea.

C. Nothing New

Just because something appears to be new in the opinions of Justice Breyer or Justice Kennedy, does not mean it is new to the history of constitutional law. The use of foreign materials by these justices may have sparked American academic interest in the topic, but others have noted that using foreign materials is nothing new in the constitutional jurisprudence of the United States Supreme Court.²⁷² Such uses, however, of foreign sources are relatively uncommon in the history of the United States.²⁷³ Looking beyond the approaches of the United States Supreme Court, this study reveals that such practices, albeit in completely different historical contexts, have been at play since the nineteenth century. The example of Vallarta and *Marbury* is not unique, even in nineteenth-century constitutionalism. Jonathan Miller's path-breaking work chronicles the use

Medina Contreras, *Notas sobre el ambiente cultural en que se educaron Iglesias y Vallarta*, in LA SUPREMA CORTE DE JUSTICIA A PRINCIPIOS DEL PORFIRISMO (1877-1882), *supra* note 2, at 965-80. For Vallarta's common law mind, see *infra* notes 302-306 and accompanying text.

269. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 59-60 (2d ed. 1985).

270. CLINTON, *supra* note 8, at 120-21; *Pollack v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *modified on reh'g* 158 U.S. 601 (1895). For a discussion of *Marbury* in *Pollack* see, Douglas, *supra* note 19, at 390-99.

271. Douglas, *supra* note 19, at 413.

272. Alford, *Four Mistakes*, *supra* note 210, at 666-70 (arguing further, however, that the Court is engaged in a new practice that is significantly different from past usages); Fontana, *supra* note 208, at 454-58 (identifying use of transnational law in landmark cases such as *Miranda* and *Roe*).

273. O'Scannlain, *supra* note 247, at 1895.

of United States sources by the Argentine Supreme Court in the late-nineteenth century.²⁷⁴ This study, examining Mexican practice in about the same period, demonstrates that the Argentine experience was not unique among the Americas. Indeed, because of the historical developments described in this article, on the level of constitutional jurisprudence, Mexico may have much more in common with its North American continental partners, Canada and the United States, than it does with its fellow civil law countries in South America.²⁷⁵

Lorraine Weinrib has argued that since World War II, a postwar paradigm of liberal democratic constitutionalism has developed throughout the world. This paradigm, centered on human dignity and the protection of rights, favors comparative approaches.²⁷⁶ Weinrib characterizes the paradigm this way: "In the postwar constitutional paradigm, courts vested with constitutional jurisdiction function as special guardians of foundational constitutional principles, including the rule of law, the separation of powers, the democratic function, and the specific rights that the constitution guarantees."²⁷⁷

Vallarta's work, firmly situated in the nineteenth century, either prefigures this wider development or challenges the chronology of these developments. Vallarta's notions of Mexican constitutionalism were consistent with, and attempted to advance, the ideals underpinning these developments, despite or perhaps because of the grave abuses of individual rights that had transpired during the regime of Porfirio Díaz.²⁷⁸ In the introduction to *El Juicio*, Vallarta writes: "How many victims of despotism in the Republic have not been freed from prison, or the gallows themselves, by the action of *amparo*! How many inhabitants of this country do not owe their life, liberty, and property to this action against the arbitrariness of

274. Miller, *supra* note 14, at 1547-61. The parallel between the Argentine Sarmiento and Vallarta are notable. *Id.* at 1516-20.

275. For arguments constructing the idea of a common constitutionalism in the NAFTA zone, despite Mexico's rather different constitutional history, see Ran Hirschl & Christopher L. Eisgruber, *Prologue: North American Constitutionalism?*, 4 INT'L J. CONST. L. 203 (2006).

276. Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 11, at 84-91.

277. *Id.* at 92.

278. "During the long presidency of General Porfirio Díaz, the government's role in preserving individual rights was limited, and significant abuses occurred, especially in the countryside. As the dictatorship calcified, protection of individual guarantees was generally ignored. Ironically, it was during this same period that the Supreme Court developed the basic doctrines surrounding the use of *amparo* to protect constitutional rights." ZAMORA ET AL., *supra* note 21, at 233.

power!²⁷⁹

Elsewhere, in the treatise, Vallarta writes of the action of *amparo*:

Describing and defining its nature, it is then understood that it does not subvert social institutions, that it is not a universal cure for all injustices, for all infractions of law, but is only established to maintain inviolable the individual guarantees, whose sum total represents the social interests; that it does not permit unlimited powers, but that, on the contrary, it is created to bar authorities of the people from abusing their power and invading authorities to the prejudice of the individual, so that the concerns that exist against it will remain disarmed.²⁸⁰

It appears that, since the rise of written constitutions in the nineteenth century, these interpretative strands and positions always have been there. Sometimes they were advanced, as in the writings and decisions of Vallarta, and sometimes they were pushed back, as in the work of Rabasa. Thus, the process may not be one so much of historical development, but rather the interplay of competing perspectives on constitutionalism existing since, at least, the rise of written constitutions.

Vallarta's statements, quoted above, which tie the *amparo* action, as effected by the supreme court to the control of abuse of power, indicate that Vallarta was attempting to construct a "protective constitution" from the Mexican Constitution of 1857. In this way, Vallarta's constitutionalism may be viewed as an early illustration of the play between "aspirational" and "protective" constitutions in the history of Latin American constitutionalism. Mauricio Garcia-Villegas has described these competing views of constitutions and notes how aspirational constitutions must change to protect individuals from the state. He states that a new legal culture can only be constructed on a new legal education and through "the elaboration of a new legal doctrine, particularly a judicial legal doctrine, that favors social change."²⁸¹ One aspect of such protective constitutions is that "they reflect an effort to secure the present" rather than reform the core of society.²⁸² Vallarta's broader appeal for his court's function, especially as it relates to judicial review, is a point on this continuum.

Nonetheless, Vallarta's wholesale acceptance of the United States constitutional method, his repeated citation of United States authority, and

279. VALLARTA, JUICIO, *supra* note 79, at 4.

280. *Id.* at 8.

281. Mauricio Garcia-Villegas, *Law as Hope: Constitutions, Courts, and Social Change in Latin America*, 16 FLA. J. INT'L L. 133, 138 (2004).

282. *Id.* at 137.

his pleas for the adoption of these materials and practices in Mexico stand in stark contrast to the present practices of the United States Supreme Court. The use and impact of foreign sources at the United States Supreme Court is at most very limited and rather unusual. Indeed, some commentators have characterized it as inconsequential and of mere rhetorical import.²⁸³ For Vallarta, it was the whole enchilada.

D. Civil Law and Common Law Constitutional Methodology

For as long as there have been constitutional judges, they have come from either common law or civil law jurisdictions. In nineteenth-century United States, the civil law tradition was viewed as incompatible with American liberty, and thus, with constitutional decision-making. There was something special about the Anglo-American common law that made it particularly suited to constitutional jurisprudence.²⁸⁴

Similarly, observers of Latin American constitutionalism have viewed the region's civil law system as an obstacle to a more robust constitutionalism. For example, Rett Ludwikowski argues that the limited role of judges and the lack of a system of judicial precedents hindered the development of judicial review in Latin America, despite the region's use of the United States Constitution as a model.²⁸⁵ From a constitutional standpoint, "a combination of civil and common law traditions worked against the full assimilation of the U.S. system in Latin American realities."²⁸⁶

Particular styles of judicial reasoning in constitutional adjudication have been attributed to the background of the judges and their civil law or common law training and perspective.²⁸⁷ Jean-François Gaudreault-Desbiens calls these modes of reasoning that are entwined with the judge's legal tradition "reasoning templates."²⁸⁸ Gaudreault-Desbiens correctly challenges the assumption that reasoning templates are incommensurable and incapable of migration. He suggests that "a migration of 'reasoning

283. Benvenuto, *supra* note 211, at 2697.

284. Morag-Levine, *supra* note 216, at 36-38.

285. Rett R. Ludwikowski, *Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law Melting Pot*, 21 B.U. INT'L L.J. 29, 46 (2003).

286. *Id.* at 49.

287. See Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 453-62 (2003); Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 OXFORD J. LEGAL STUD. 435, 439-44 (2003).

288. Jean-François Gaudreault-Desbiens, *Underlying Principles and the Migration of Reasoning Templates: A Trans-Systemic Reading of the Quebec Secession Reference*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 11, at 178.

templates' is at least *possible* across legal traditions, through conscious or unconscious processes."²⁸⁹ Although Gaudreault-Desbiens' study addresses the Quebec Secession Reference and argues for the recognition of a *jus commune* of constitutional law, he finds these distinctions generally useful. Indeed, in analyzing the decision of the Supreme Court of Canada whether Quebec could unilaterally secede from Canada,²⁹⁰ he writes:

Such a purposive reading, which in my view reveals a conception of interpretation that treats the text of the Constitution as mere expression of an overarching form of *jus commune*, is closer to civil law than to common law reasoning. . . . Indeed, that tradition is possibly more open than the common law to the idea of positing in major legal enactments, such as civil codes or constitutions, norms that seek to enshrine broad aspirations rather than obviously prescriptive, sanctionable duties.²⁹¹

Under different terminology and with closer geographic specificity, the idea of reasoning templates is similar to the "[t]wo [w]orldviews in Latin American Constitutional law" advanced by Landau.²⁹² Landau divides modern Latin American constitutional judges into two groups: traditionalist-positivists and new constitutionalists. Traditionalist-positivists, like the good civilians they are, will "interpret constitutions just like ordinary statutes."²⁹³ New constitutionalists, however, will treat constitutional interpretation as a different enterprise from statutory interpretation by reading the text "broadly and with the document's hierarchy of ideals in mind."²⁹⁴ Landau then links the traditionalist approach with the career judge and the new constitutionalist approach with constitutional or public law professors who advance a "high-level academic/judicial discourse moving towards expansive constitutionalism."²⁹⁵

Landau reads these worldviews into the decisions and language of the Colombian Constitutional Court of the 1980s and 1990s. The traditionalists, predominant in the 1980s, discounted aspirational aspects of

289. *Id.* at 179.

290. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

291. Gaudreault-Desbiens, *supra* note 288, at 206.

292. David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, 37 GEO. WASH. INT'L L. REV. 687, 708 (2005).

293. *Id.* at 709.

294. *Id.*

295. *Id.* at 710.

constitutional language to favor legal rules that could be applied in narrowly defined judicial roles.²⁹⁶ Traditionalists used the same approaches for statutory and constitutional interpretation, and only applied broader principles when addressing questions of governmental structure, such as presidential powers under the Constitution.²⁹⁷ Landau speculates that traditionalists were willing to take on a broader interpretation because of the established split between public law and private law in the civil law tradition.²⁹⁸ Traditionalists read the constitution though “code values” which Landau describes as “politically conservative values reflected in the old nineteenth century codes, particularly the Civil Code.”²⁹⁹ Interpreting constitutional provisions through “code values” produces narrow interpretations that do not broaden the application of constitutional protections.

New constitutionalists, coming to the fore in the 1990s, in Landau’s view, undertake constitutional interpretation in a very different way. “Values” and “principles” guide constitutional interpretation and constitutional courts demand a new role for precedent. These notions include ideas of the social reality and a balance of power in government.³⁰⁰ Constitutional interpretation must respond to the broader principles and social aspects.

The divide between Vallarta and Rabasa speaks to the reasoning template analysis of Gaudreault-Desbiens and to Landau’s categories of “traditionalist” and “new constitutionalist.” First, Vallarta’s works indicate that he successfully adopted the reasoning template of the common law, despite his civil law training and experience. This created a dissonance with Rabasa’s views which argued for the limited role of judges and the literal and narrow interpretation of the constitutional language, substantially limiting the possible application of the court’s *amparo* decisions through judicial review.³⁰¹ Indeed, Vallarta argued for a broader method of constitutional interpretation, asking judges to reject the “studied brevity” and “routine formulas” of the civil law case reporting.³⁰² In the 1880s, Ignacio Vallarta was a proto-new constitutionalist. In 1919, Rabasa was the traditionalist who used civil law methods to challenge,

296. *Id.* at 715-16.

297. *Id.* at 717-19.

298. *Id.* at 720.

299. *Id.*

300. *Id.* at 727-31.

301. See *supra* notes 139-145 and accompanying text.

302. VALLARTA, JUICIO, *supra* note 79, at 320.

successfully, those constitutional views.

In this light, Jeffrey Goldsworthy's critique of Joseph Raz's discussion of constitutional interpretation is useful.³⁰³ In response to Raz's idea of "innovative" interpretations, which change the meaning of the constitution with the aim of better government or better justice, Goldsworthy states:

One major problem with Raz's thesis is that courts rarely, if ever, say they are changing a constitution. . . . Even in cases where it seems that they are changing the constitution, they do not claim to be doing so. They do not say, for example: "although the constitution currently means *X*, we believe that justice (or good government) would be better served if it meant *Y*, and therefore we have decided to change it". Instead they usually take great pains to demonstrate that their interpretation is faithful to the constitution as it is. Even when judges purport to enforce unenumerated, implied principles, they usually claim to have found those principles in the constitution, not added them in.³⁰⁴

So it was with Vallarta. The doctrine of judicial review could be implied from the Mexican Constitution, just as Marshall was able to infer it from the U.S. Constitution. Vallarta not once stated that he was changing the Constitution, even though he was, in effect, arguing for an entirely different constitutional regime.³⁰⁵ Similarly, when faced with the Otero Formula, restricting the application of the decision to only the parties to the dispute, Vallarta took great pains to demonstrate how his broad based interpretation was consonant with the language of the Constitution.³⁰⁶ Judges, particularly judges trained in the civil law, introduce change in subtle ways that appear to be as consistent with the text as possible. Overt statements of innovative constitutional change are not the way of constitutional courts, at least nineteenth century courts that functioned within the worldview of the civil law, with critics like Rabasa watching.

303. Jeffrey Goldsworthy, *Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence*, in THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 11, at 115, 128.

304. *Id.* at 128.

305. *See supra* note 139-145 and accompanying text.

306. *See supra* notes 140-146 and accompanying text.

E. Comparative Constitutionalism, Foreign Elite Capital, and Politics

Comparative constitutionalism also may be properly viewed as expressions of foreign expertise for either political or personal benefit. Vallarta's opinion in the *Prieto Amparo* had a profoundly political aspect; he sought to establish constitutional review of state statutes and he asserted that this practice was properly within the judicial branch. In other words, he argued for nothing less than a restructuring of the distribution of power under the Mexican Constitution. On a more mundane, though no less important level, every assertion of individual rights in response to the state is also political, in that it limits and defines the proper actions and functions of the state and its organs.

When contrasted with the United States Supreme Court's practice, the history of judicial review and comparative constitutionalism indicates that there is nothing predetermined about whether such practices are left-leaning or right-leaning.

In the present controversy over the use of comparative constitutionalism by the United States Supreme Court, Richard Goldstone, a former justice of the South African Constitutional Court, critiqued opponents of the practice on political grounds. Goldstone states, "So, in doing what other democracies are doing, it would mean looking to the left, not to the right; I think conservatives in the United States are saying, 'Don't do it, because it gives us bad answers.'"³⁰⁷

Nonetheless, it is the "bad answers" aspect of comparative constitutionalism that leads to its rejection, rather than its "looking to the left." Rabasa's concern that a supreme court might not permit socially progressive legislation to pass muster, a theme picked up by Tena Ramírez, showed that their fear of looking to the United States was a fear of "looking to the right."³⁰⁸ Thus this study illustrates the principle that comparative constitutionalism will not always point in either a liberal or conservative direction.³⁰⁹

Furthermore, the use of foreign materials is a characteristically elite practice. In criticizing the practice by the United States Supreme Court, John McGinnis argues that, in the absence of any substantial and valid justification, Supreme Court Justices are drawn to foreign sources as the

307. Alford, *Four Mistakes*, *supra* note 210, at 674 (citing Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, *NEW YORKER*, Sept. 12, 2005, at 42).

308. See *supra* notes 176-186 and accompanying text.

309. See Alford, *Outsourcing Authority*, *supra* note 210, at 675-79.

“aristocratic element of a mixed regime.”³¹⁰ Justices turn to foreign sources because they have become part of the “cognitive elite” who are influenced by their globalized contacts with foreign judges during “long summer recess” at “Lake Como or the south of France.”³¹¹ Thus, sociology is the key.

And, indeed, it may be in Vallarta’s case as well.³¹² Throughout his career, Vallarta displayed his exceptional intellectual abilities. He was a master of both Mexican law and United States law. He had the elite access that only travel, the English language, and political goodwill could provide.³¹³ These experiences shaped his life of public service, his support for the Díaz regime, and his presidency of the supreme court. In his unsuccessful bid to transform completely the supreme court, Vallarta knew that it was not his work on the bench, but rather his reporting of that work, with all its citation to domestic and foreign law, that might push the entire Mexican constitutional system in the direction he desired. Published case reports in Vallarta’s style were, in themselves, a foreign novelty, a migration of judicial style.³¹⁴ Vallarta reiterated his arguments for constitutional transformation in the more palatable form of a treatise, his work on *amparo* and habeas corpus.³¹⁵ His was an elite voice calling for change, but it would be drowned out by the new post-revolutionary elite of Rabasa and Tena Ramírez who would chart Mexican constitutionalism in a very different direction.³¹⁶

These aspects of Vallarta’s work provide an early illustration of what Yves Dezalay and Bryant Garth call the “internationalization of palace wars” in which lawyers import foreign expertise and international strategies to fight domestic political battles and advance local domestic strategies.³¹⁷

310. John O. McGinniss, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 325 (2006).

311. *Id.* at 326-27; see also Kenneth Anderson, *Foreign Law and the U.S. Constitution*, 131 POL’Y REV. 33 (2005) (describing Justices promoting a set of values of the globalized elite bourgeois).

312. For present-day Mexican practice, see Larissa Adler Lomnitz & Rodrigo Salazar, *Cultural Elements in the Practice of Law in Mexico: Informal Networks in a Formal System*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 209-48 (Yves Dezalay & Bryant G. Garth eds., 2002).

313. See biography *supra* note 2.

314. MIROW, *supra* note 13, at 131.

315. See *supra* notes 137-148 and accompanying text.

316. See *supra* notes 160-205 and accompanying text.

317. YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF THE PLACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 5 (2002).

The concept of international strategies . . . provides a means to study the relationship between global influences and state transformations. International strategies refer to the ways that national actors seek to use foreign capital, such as resources, degrees, contacts, legitimacy, and expertises—which we pluralize in order to highlight the competing forms and technologies—to build their power at home. . . . Foreign expertise is used, that is, to fight against opponents for control over state power.³¹⁸

Dezalay and Garth use the term “technopols” to describe such actors who apply their, often foreign-acquired, technical expertise to political involvement.³¹⁹

Vallarta, with foreign expertise in United States constitutional law and English sources, used this capital to advance a redistribution of state power that would elevate the judiciary, and as a result, his own position in the Mexican political structure. It is with perhaps unwitting perceptiveness that Dezalay & Garth write of Latin America today with words that apply equally to Vallarta in the midst of the Porfiriato:

International strategies, finally, tend to be highly class determined. The cosmopolitan families who speak English well enough and have sufficient material resources to take advantage of opportunities in the United States, for example, are not just average families. The people who follow these strategies are typically individuals who have some inherited resources and a disposition to take advantage of foreign opportunities.³²⁰

These attributes and skills would have played particularly well during the Porfiriato of the 1880s. It was a time when foreign things were greatly admired and emulated.³²¹ The United States and England were significant contributors of financing and expertise in the technological developments Díaz encouraged.³²² While United States money and know-how assisted transportation, mining, and communications, France, as usual in the nineteenth century, dictated cultural and social fashion. “The true measure of aristocratic success was to see how French one could become in taste and manners.”³²³

318. *Id.* at 7.

319. *Id.* at 28.

320. *Id.* at 9.

321. MICHAEL C. MEYER ET AL., *supra* note 149, at 451.

322. *Id.* at 425-37.

323. *Id.* at 458.

Law was, of course, somewhat different, and a distinction must be made between civil law and constitutional law in this period. French and other continental sources took pride of place for the study and application of the civil law in Mexico.³²⁴ Mexican constitutional law was very much under the spell of those familiar with the text of the United States constitution, the decisions of the United States Supreme Court, and the main treatise writers, often but not always, available only in English.³²⁵ Because of the various expertises and experiences Vallarta brought to his work at the supreme court and his attempt to restructure the constitutional allocations of power in Mexico, he may properly be considered, borrowing the terminology of Dezalay, Garth and others, a proto-technipol.

IV. Conclusion

Judicial review's precocious southern migration resulted from Vallarta's work on the Mexican Supreme Court in the 1880s. He was a proto-new constitutionalist,³²⁶ a proto-technipol,³²⁷ who, by his typical civil law reliance on United States treatises, could gaze into the future of what *Marbury* would some day mean in the common law United States. His work in comparative constitutionalism and the methodological challenges he faced illuminate the practice of the United States Supreme Court today.

Recent trends in Mexican law indicate that Vallarta may have been precocious not only in his reading of *Marbury*, but in his entire vision of the Mexican constitutionalism. Since the year 2000, Mexico is "in a new era of constitutionalism."³²⁸ With a reduction of administrative responsibilities and an increased focus on purely constitutional matters, the Mexican Supreme Court has entered a new phase where it now "must analyze public and social policy in the process of establishing new legal and constitutional doctrines."³²⁹ Since 1995, a new "action of unconstitutionality" provides that the court, under some circumstances, can declare legislation unconstitutional with *erga omnes* effect.³³⁰ *Amparo* actions continue to be limited to the parties in the particular dispute.³³¹

324. MIROW, *supra* note 13, at 167-69.

325. *Id.* at 117-18. Vallarta and Rabasa serve as two examples of this broader reliance on United States materials, obviously dictated by the constitutional texts themselves.

326. *See supra* note 300 and accompanying text.

327. *See supra* note 319 and accompanying text.

328. Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After Presidencialismo*, 4 INT'L J. CONST. L. 411, 411 (2006).

329. *Id.* at 423.

330. ZAMORA ET AL., *supra* note 21, at 285.

331. Zamora & Cossío, *supra* note 328, at 413.

Indeed, the only recent citation to *Marbury* by a Mexican court notes that the Mexican Constitutions of 1857 and 1917

opted to select a juridical solution different from the one adopted in the United States. Such a solution was adopted because the *Marbury v. Madison* decision was made in 1803 and it was considered proper in our country to note that although a statute or general disposition was declared unconstitutional, this was limited to the individual claimants, but in a way that it could still be applied *erga omnes*.³³²

The tension between the Otero Formula and *Marbury* can be felt to the present day in Mexican courts. Nonetheless, the theory and use of *jurisprudencia*, and the means for accessing its sources, are all undergoing rapid growth in the present period.³³³ In addition to several government projects to provide on-line accessible databases of cases, the foremost institute of legal research in Mexico, the *Instituto de Investigaciones Jurídicas*, also has plans for electronic databases of *jurisprudencia*.³³⁴ The project has been christened "*El Sistema Vallarta*."³³⁵

332. PRECIOS Y TARIFAS, FIJACION DE NO CORRESPONDE AL PODER JUDICIAL, Primer Tribunal Colegiado en Materia Administrativa del Primer Circuito [T.C.C.], *Semanario Judicial de la Federación*, Séptima Época, Enero-junio de 1982, Volúmenes 157-162, Sexta Parte, Amparo en revisión 1001/80, Página 127-29 (Mex.).

333. RAÚL PLASCENCIA VILLANUEVA, *JURISPRUDENCIA* 1-25 (1997).

334. *Id.* at 65-74.

335. *Id.* at 69.

Appendix

<p style="text-align: center;">Vallarta's Opinion in the Prieto <i>Amparo</i></p> <p>3 VALLARTA, VOTOS, <i>supra</i> note 1, at 395-404 (emphasis, ellipses, spelling, and accents original).</p>	<p>KENT, <i>supra</i> note 123, at 449-450.</p>
<p>El principio admitido en Inglaterra, dice Kent, de que el Parlamento es omnipotente, no está aceptado en los Estados-Unidos.</p>	<p>The principle in the English government, that the Parliament is omnipotent, does not prevail in the United States though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other form of government.</p>
<p>En el país en donde una Constitucion escrita determina las facultades y los deberes de [396] cada uno de los poderes del Gobierno, una ley puede quedar sin efecto, si fuere contraria á la Constitucion.</p>	<p>But in this, and all other countries where there is a written constitution, designating the powers and duties of the legislative, as well as of the other departments of the government, an act of the legislature may be void as being against the constitution.</p>

<p>Los tribunales están obligados á confrontar cada ley con el texto de la Constitución.</p>	<p>The law with us must conform, in the first place, to the Constitution of the United States, and then to the subordinate constitution of its particular state, and if it infringes the provisions of either, it is so far void. The courts of justice have a right, and are in duty bound, to bring every law to the test of the Constitution, and to regard the Constitution, first of the United States, and then of their own state,</p>
<p>como que ésta es la suprema ley con la que todas las otras deben conformarse.</p>	<p>As the paramount or supreme law, to which every inferior or derivative power and regulation must conform.</p>
<p>La Constitución es la expresión de la voluntad del pueblo, hecha originalmente por él mismo, definiendo las condiciones permanentes de la alianza social: por consiguiente, entre nosotros, no se puede dudar que tal ley contraria al espíritu y letra de la Constitución, es absolutamente nula y de ningún valor (that every act of the legislative power contrary to the true intent and meaning of the constitution, <i>is absoluty [sic] null and void</i>).</p>	<p>The Constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point with us, that every act of the legislative power, contrary to the true intent and meaning of the Constitution, is absolutely null and void.</p>
<p>Toca al Poder judicial determinar si una ley es ó no constitucional.</p>	<p>The judicial department is the proper power in government to determine whether a statute be or be not constitutional.</p>

<p>La interpretacion, la fijacion del sentido de un texto constitucional, es un acto judicial que requiere el ejercicio del Poder, que tiene á su cargo la interpretacion y aplicacion de las leyes.</p>	<p>The interpretation or construction of the Constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or constuction of a law.</p>
<p>Pretender que los tribunales deban obedecer sin discernimiento todas las leyes, aunque alguna les parezca contraria á la Constitucion, seria pretender que esa ley fuese superior á la Constitucion, y que los jueces no vieran en ésta la ley suprema de la tierra.</p>	<p>To contend that the courts of justice must obey the requisitions of an act of the legislature when it appears to them to have been passed in violation of the Constitution, would be to contend that the law was superior to the Constitution, and that the judges had no right to look into it, and regard it as a paramount law.</p>
<p>Esto conduciria á reputar mayor el poder del Congreso que el del pueblo, y á declarar que el capricho de un Congreso. . . . podia destruir todo el edificio del Gobierno y las leyes fundamentales en que él está basado.</p>	<p>It would be rendering the power of the agent greater than that of his pricipal, and be declaring, that the will of only one concurrent and coordinate department of the subordinate authorities under the Constitution was absolute over the other departments, and competent to control, according to its own will and pleasure, the whole fabric of the government, and the fundamental laws on which it rested.</p>

Las restricciones impuestas al Poder legislativo por la Constitucion, serian inútiles si otro Poder no pudiera hacerlas efectivas.

The attempt to impose restraints upon the exercise of the legislative power would be fruitless, if the constitutional provisions were left without any power in the government to guard and enforce them.

From the mass of powers necessarily vested in the legislature, and the active and sovereign nature of those powers; from the numerous bodies of which the legislature is composed, the popular sympathies which it excites, and its immediate dependence upon the people by the means of frequent periodical elections, it follows that the legislative department of the government will have a decided superiority of influence. It is constantly acting upon all the great interests in society, and agitating its hopes and fears. It is liable to be constantly swayed by popular prejudice and passion, and it is difficult to keep it from pressing with injurious weight upon the constitutional rights and privileges of the other departments.

<p>El Poder judicial, respetable por su independencia, venerable por su sabiduría y gravedad, es el más á propósito para ejercer el alto deber de exponer é interpretar la Constitucion, y juzgar de la validez de las leyes segun aquellos principios (and trying the validity of statutes by that standard). Por el libre ejercicio de ese deber, los tribunales.....pueden proteger á cada uno de los departamentos del Gobierno, y á cada miembro de la sociedad contra las ilegales y destructoras innovaciones de sus derechos constitucionales.</p>	<p>An independent judiciary, venerable by its gravity, its dignity and its wisdom, and deliberating with entire serenity and moderation, is peculiarly fitted for the exalted duty of expounding the Constitution, and trying the validity of statutes by that Standard. It is only by the free exercise of this power that courts of justice are enabled to repel assaults, and to protect every part of the government, and every member of the community, from undue and destructive innovations upon their chartered rights.</p>
<p>Ha llegado por esto á ser un principio indisputable (a settled principle) en este país, que pertenece al Poder judicial el deber de declarar <i>nula y de ningun valor</i> la ley expedida en violación de la Constitucion.</p>	<p>It has accordingly become a settled principle in the legal polity of the country, that it belongs to the judicial power as a matter of right and of duty, to declare every act of the legislature, made in violation of the Constitution, or any provision of it, null and void.</p>

	<i>The Federalist No. 78, supra</i> note 5.
<p>Otro insigne expositor de la Constitución americana, Hamilton, defiende las mismas teorías con estos enérgicos argumentos:</p> <p>No hay verdad que en más claros principios esté fundada, que esta: todo acto de una autoridad delegada, contrario al tenor de su comision, es nulo. Por tanto, ninguna ley contraria á la Constitucion, puede ser válida. Negar esto, seria afirmar que el diputado es superior al comitente, que los representantes del pueblo son superiores al pueblo mismo, y que ellos, obrando en virtud de ciertos poderes, pueden no sólo hacer aquello para lo que esos poderes no los autorizan, sino lo que les prohíben.</p>	<p>There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than the principal, that the servant is above his master, that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.</p>

Los que en la escuela romana hemos aprendido la regla de que <<el juez no juzga de las leyes,>> sentimos repugnancia á aceptar el principio americano, que faculta, más aún, que impone el deber á los tribunales de juzgar de las leyes, par el efecto de saber si son ó no constitucionales. Pero esa repugnancia no puede ménos que desaparecer, todas las resistencias tienen que ceder, cuando la luz de la evidencia baña la filosofía democrática de ese principio. Me permito todavía seguir traduciendo las incontestables palabras del mismo Hamilton, que raciocina así:

La interpretación de las leyes, cae bajo la competencia del Poder judicial. Una Constitucion es y debe ser respetada por los jueces como la ley fundamental. Debe pertenecer á ellos, pues, interpretar su sentido, como interpretan cualquiera otra ley que vota el Congreso. Si entre las leyes fundamental y secundaria hubiese alguna inconciliable contradiccion, aquella que tiene superior fuerza y validez, debe por tanto ser preferida á ésta: en otros terminos, la Constitucion debe prevalecer sobre la ley secundaria, la voluntad del pueblo sobre la de sus representantes.

Esta teoría se confirma con el ejemplo de lo que todos los dias acontece.

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. . . .

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance.

<p>Repetidas veces se presentan dos leyes en conflicto, que no pueden armonizarse....</p>	<p>It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repeal clause or expression.</p>
<p>En tal caso, es de la competencia de los tribunales interpretar su sentido para ponerlas en concordancia.....</p>	<p>In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done.</p>
<p>Si esto de ninguna manera pudiera conseguirse, porque una ley sea contraria á la otra, es indispensable aplicar una de preferencia á la otra. Los tribunales en ese conflicto siguen la regla de que la ley posterior en fecha deroga la anterior y prefieren aquella á ésta</p>	<p>Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of things. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law.</p>

<p>Ellos creen, y con razón, que en el conflicto de dos leyes opuestas, y que proceden de <i>igual autoridad</i>, la más reciente se debe preferir, por contener ella la última disposición de esa autoridad.</p>	<p>They thought it reasonable, that between the interfering acts of EQUAL authority, that which was the last indication of its will should have the preference.</p>
<p>Pero cuando se trata de leyes emanadas de autoridades desiguales, la una suprema, la otra subalterna, la razón y la naturaleza misma de las cosas revelan que se ha de seguir la regla contraria : la sola razón, en efecto, nos enseña que el mandato de una autoridad superior debe obedecerse antes que el de una inferior y subalterna, y que por tanto, si una ley secundaria contraría á la Constitución, debe ser el deber de los tribunales ajustarse á los preceptos de ésta, sin tomar en consideración los de aquella.</p> <p>Estas teorías en el pueblo vecino, no son meramente especulativas; ellas tienen una vida real y positiva; ellas son aplicadas por los tribunales, y no una, sino muchas ejecutorias las consagran. En gracia del interés de la material que analizo, me creo aún obligado á extractar las argumentaciones con que la Corte de Justicia de los Estados-Unidos sostuvo esas teorías en un caso por ella decidido en Febrero de 1803.</p>	<p>But in regard to the interfering acts of a superior and subordante authority, of an original and derivative power, the nature and reason of the thing indicate the converse of the rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.</p>

	<i>Marbury v. Madison</i>, 5 U.S. 137, 176-179 (1803).
La cuestión de si una ley contraria á la Constitución, son estas las palabras de esa ejecutoria, puede ser una verdadera ley, es altamente interesante para los Estados-Unidos; pero por fortuna, la dificultad de esa cuestion no es igual á su interes. Basta invocar ciertos principios bien establecidos, para decidirla.	The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established to decide it.
La base sobre la que está fundado todo el Gobierno americano, es que el pueblo tiene el derecho de darse las instituciones que en su opinion sirvan mejor á su prosperidad. Este derecho no se ejerce, ni pudiera hacerse así, frecuentemente. Los principios constitucionales establecidos, están por esto reputados fundamentales, y como la autoridad de que preceden es suprema, ellos se tienen también como permanentes.	That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

<p>La original y suprema voluntad del pueblo, revelada en la Constitución al organizarse el Gobierno, asigna á cada uno de sus departamentos ciertas facultades, y les fija ciertos límites....</p>	<p>This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description.</p>
<p>Los poderes del Legislativo están definidos y limitados, y estos límites no pueden traspasarse.... Si así no fuera, ¿para qué serviría que tales limitaciones se hubieran consignado en las Constitución?.....</p>	<p>The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.</p>

<p>Este dilema es apremiante: ó la Constitucion prevalece sobre toda ley contraria á ella, ó el Poder legislativo puede alterar la misma Constitucion por un acto ordinario, por una ley comun. Entre esos extremos no hay medio: ó la Constitucion es la ley suprema, que no puede ser derogada ni modificada por los medios ordinarios legislativos, ó ella está al nivel de todas las leyes, que pueden ser derogadas por el Congreso, siempre que él lo quiera.</p>	<p>It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.</p>
<p>Si lo primero es lo cierto, entonces la ley contraria á la Constitucion, no es ley; pero si lo Segundo lo fuese, habría necesidad de decir que la Constitucion no es más que la loca tentativa del pueblo, que quiso limitar un poder que no había de tener límites.</p>	<p>If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.</p>

Los pueblos regidos por constituciones escritas, reputan á éstas la ley suprema y fundamental, y la teoría en tales gobiernos admitida, es que una ley contraria á la Constitucion no puede producir efectos....Esta Corte considera á esa teoría como uno de los principios fundamentales de nuestra sociedad...

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

Y si una ley contraria á la Constitucion no produce efecto, ¿puede ella á pesar de no ser valida, obligar á los tribunales? En otros terminas: á pesar de que ella no es ley, ¿debe ser aplicada como si lo fuera? Esto seria destruir en la práctica lo que en teoría se acepta.....

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

<p>Cae bajo la competencia del Poder judicial interpretar las leyes, para aplicarlas á los casos que ocurren....Si dos leyes están en conflicto, toca á los tribunales deciden cuál es la vigente.</p>	<p>It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.</p>
<p>Si una ley estuviera en oposicion con la Constitucion, y si en un caso debiera aplicarse ó la Constitucion ó esa ley, de tal modo que la Corte hubiera de decidir semejante caso, ó conforme á esta ley, no considerando la Constitucion, ó conforme á la Constitucion sin tomar en cuenta á la ley, la Corte ántes debe resolver cuál de esos dos preceptos contradictorias se debe obedecer. Esto compete esencialmente al Poder judicial.</p>	<p>So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.</p>
<p>Por tanto, si los tribunales tienen que respetar la Constitucion, y si ésta es suprema ley, superior á cualquiera otra secundaria, la Constitucion, y no la ley secundaria debe aplicarse al caso en cuestion.</p>	<p>If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.</p>

Los que ponen en duda esta teoría....están por necesidad obligados á negar que la Constitucion sea la suprema ley, á sostener que los tribunales no deben respetarla. Y esto destruiria el fundamento de toda Constitucion escrita: declararia que una ley que, segun los principios de nuestro gobierno, carece de todo efecto, es sin embargo en la práctica completamente obligatoria: declararia que si el Legislativo hace lo que le está expresamente prohibido, sus actos, á pesar de todo, deben ser válidos en la práctica: esto daria al Legislativo una real y positiva omnipotencia, cuando la Constitucion limita sus poderes: esto seria asignar ciertos límites, y declarar que ellos pueden traspasarse á voluntad de la autoridad á quien se imponen.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

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	<p><i>[continued from previous page]</i></p> <p>That it thus reduces to nothing what we have deemed the greatest improvement on political institutions--a written constitution--would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.</p> <p>The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into?</p>
<p>Sostener que los tribunales federales, que deben juzgar según la Constitución, no deben observarla.....es una extravagancia que no puede defenderse.</p>	<p>That a case arising under the constitution should be decided without examining the instrument under which it arises?</p> <p>This is too extravagant to be maintained.</p>

<p>En ciertos casos, la Constitucion habla especialmente á los jueces....</p>	<p>In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey? There are many other parts of the constitution which serve to illustrate this subject.</p>
<p>por ejemplo, ésta ha declarado que <<ningún derecho se podrá imponer sobre las exportaciones de cada Estado.>> Supóngase que tal derecho se establece sobre la exportacion del algodón, del tabaco, de la harina, y que es entabla sobre esto un juicio.....¿Deberian los jueces apartar la vista de la Constitucion, para no ver más que la ley?</p>	<p>It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?</p>
<p>La Constitucion manda que no se expida ninguna ley <i>ex post facto</i>. Pero sin embargo de todo se expide, y una persona es enjuiciada segun ella. ¿Podria esta Corte condenar á aquellos á quienes la Constitucion defiende?</p>	<p>The constitution declares that "no bill of attainder or <i>ex post facto</i> law shall be passed." If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?</p> <p><i>[continued next page]</i></p>

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"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out of court*, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.

<p>Qué significaría el juramento de obedecer y guardar la Constitución que prestan los jueces, si su deber fuera violar lo que ellos juran guardar? Esto sería verdaderamente inmoral....</p>	<p>Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?</p> <p>The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to <i>the constitution</i>, and laws of the United States."</p>
<p>Estando declarado que la Constitución es la <i>suprema ley</i> de la tierra, la Constitución misma se ha designado el primer lugar entre todas las leyes; y es también digno de notarse, que la Constitución no llama leyes á todas las que un Congreso expida, sino sólo á aquellas que se expidan en cumplimiento de ella.</p>	<p>It is also not entirely unworthy of observation, that in declaring what shall be the <i>supreme law of the land</i>, the <i>constitution</i> itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in <i>pursuance</i> of the constitution, have that rank.</p>

El mismo lenguaje de la Constitución afirma, pues, el principio esencial en nuestro gobierno, de que una ley contraria á ella, no es ley, ni produce efectos, y que el Poder judicial, lo mismo que los otros poderes públicos, está obligado á respetar la Constitución.

Estas teorías se han elevado á la categoría de máximas incontrovertibles en los Estados-Unidos; <<máximas, estimadas por Kent, como las más interesantes que los tribunales hayan consagrado a favor de la libertad constitucional y de la seguridad de la propiedad en ese país.>> Esas máximas están enseñadas unánimemente por los publicistas y sancionadas en repetidas ejecutorias. Veanse entre otros, Story on Const., volumen 2., numero 1842; Paschal Annot., Const., nums. 238, 239, 240 y 241; Curtis. Hist. of the Const., tomo 2., pagina 436, etc., etc.

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Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

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Son de tal modo aplicables esas teorías a nuestro derecho constitucional, que bien se puede tenerlas como su racional y filosófica exposición: abstracción hecha del nombre de los publicistas americanos, sus razonamientos son tan apremiantes, que, aceptado el texto del art. 126 de nuestra Constitución, es necesario llegar hasta las consecuencias que ellos sostienen: la ley es igual aquí y en los Estados-Unidos, su filosofía, su inteligencia, debe en ambos países ser la misma: la autoridad científica de los textos que he citado, es irrecusable entre nosotros.